Supreme Court, U.S.
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No. 00 189

In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA
and COEUR D'ALENE TRIBE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Alaska*, 521 U.S. 1 (1997), this Court held, in the context of a statehood act, that congressional ratification of an executive order reservation known to include submerged lands may imply an affirmative intent to defeat state title to the submerged lands. This petition presents the related question of whether a defeat of state title to submerged lands is implied when Congress, in a pre-statehood act, authorizes cession negotiations with an Indian tribe for the purpose of removing submerged lands from the executive order reservation they occupy.

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PETITION FOR A WRIT OF CERTIORARI

The State of Idaho petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals (App. 1-30) is reported at 210 F.3d 1067 (9th Cir. 2000). The decision of the district court (App. 31-86) is reported at 95 F. Supp. 2d 1094 (D. Idaho 1998).

JURISDICTION

The court of appeals entered its judgment on May 2, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 4, Section 3, Clause 2 of the United States Constitution provides in relevant part as follows:

> The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

The 1889 Indian Department Appropriations Act provides in relevant part as follows:

> That the Secretary of the Interior be, and he is hereby, authorized and directed to negotiate with the Coeur d'Alene tribe of Indians for the

> purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress and for the purpose of such negotiation, the sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated; the action of the Secretary of the Interior hereunder to be reported to Congress at the earliest practicable time.

Act of March 2, 1889, 25 Stat. 980, 1002.

Also relevant to the court of appeals' decision were those portions of the 1891 Indian Department Appropriations Act that ratified two cession agreements with the Coeur d'Alene Tribe. Act of March 3, 1891, 26 Stat. 989, 1027. The relevant provisions in the 1891 Act are reproduced in the attached appendix at App. 87-98.

STATEMENT

On March 3, 1889, Congress appropriated funds to negotiate an agreement with the Coeur d'Alene Tribe for the cession of a portion of the reservation they occupied, which had been set aside sixteen years earlier by executive order. On May 2, 2000, the United States Court of Appeals for the Ninth Circuit found that in doing so, Congress had impliedly defeated the future State of Idaho's title to submerged lands within the Coeur d'Alene Indian Reservation.

The court of appeals' decision upsets a century of State ownership. For over 100 years, Idaho has safeguarded Coeur d'Alene Lake and the St. Joe River as vital public resources, guaranteeing every citizen access for

diverse uses such as commerce, fishing, swimming and boating. The State has been an active manager of these important resources. Since statehood, it has protected the public's interest in the open use of Coeur d'Alene Lake. *See Shephard v. Coeur d'Alene Lumber Co.*, 101 P. 591, 592 (Idaho 1909) (declaring that Coeur d'Alene Lake "is a public highway"). With federal cooperation, it has set apart lands and waters adjacent to the St. Joe River as a public park. 1911 Idaho Sess. Laws 334. In 1927, the State appropriated the water in Coeur d'Alene Lake "in trust for the people of the state of Idaho," in order to preserve the water "for scenic beauty, health, recreation, transportation and commercial purposes . . . . " Idaho Code § 67-4304 (1995). At the same time, the State declared the submerged lands under the Lake "to be devoted to a public use in connection with the preservation of said [lake] in [its] present condition as a health resort and recreation place for the inhabitants of the state . . . . " Idaho Code § 67-4305 (1995).

The unique role that Coeur d'Alene Lake has played in the history of Idaho is jeopardized by the recent decision of the Ninth Circuit Court of Appeals. The decision of the court of appeals, as well as that of the district court, both rely heavily on a recital of historical facts, starting with President Andrew Johnson's 1867 executive order that withdrew a small reservation for the use of the Coeur d'Alene Tribe. The 1867 Reservation was centered around the agricultural land of the Hangman Valley, about 20 miles south of Coeur d'Alene Lake. App. 32. Although its boundaries were never surveyed, it did not include any significant portion of the navigable waters at issue here. App. 32-33. The 1867 Reservation was never formally accepted by the Tribe, and, in 1873, representatives of the United States and the Tribe held negotiations

and agreed to establish a larger reservation of 598,000 acres. App. 33. The agreed-upon boundaries included almost all of Coeur d'Alene Lake, along with the lower portions of the Coeur d'Alene River and the St. Joe River, and the upper portion of the Spokane River. App. 33. The inclusion of the Lake was, in part, a response to tribal demands based on fishing needs, App. 56-57, a need the Tribe itself described as temporary pending its transformation to an agricultural economy.[1]

Following the conclusion of the negotiations, President Ulysses S. Grant withdrew the agreed-upon reservation from the public domain. App. 34-35; map, App. 99.[2] The executive order was intended as a temporary withdrawal of lands from sale until such time as Congress established a permanent reservation. App. 35.[3] For various reasons, however, the bill to ratify the 1873 Agreement was withdrawn from consideration, and so the executive order withdrawal remained in place. It was not

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[1] In an 1872 petition to the Commissioner of Indian Affairs, the Tribe affirmed its commitment to an agricultural economy, but admitted that "we are not yet quite up to living on farming," and stated that "for a while yet we need have some hunting and fishing." App. 51 (quoting petition of November 18, 1872).

[2] The map in the appendix was prepared specifically for inclusion in this brief, and was not part of the record below.

[3] On its face, the 1873 executive order states: "It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians . . . . " Executive Order of November 8, 1873, 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 837 (1904). The letter from the Commissioner of Indian Affairs that requested the executive order proposed setting apart the reservation "[i]n order that the tract may be protected from trespass by white persons pending the action of Congress upon [the 1873] agreement . . . . " App. 57.

until 1886 that Congress authorized new negotiations with the Tribe. Act of May 15, 1886, 24 Stat. 29, 44. The authorized negotiations occurred in 1887, resulting in a proposed agreement that would have confirmed the 1873 boundaries and extinguished all claims of aboriginal title outside those boundaries. The agreement was sent to Congress for ratification (hereinafter the "1887 Agreement"). App. 68.

Subsequent events, however, highlighted the inclusion of the Lake within the exterior boundaries of the Reservation, and spurred Congress to suspend its review of the 1887 Agreement. In 1880, steamboats started using the Lake to transport men and goods between the city of Coeur d'Alene and a landing on the Coeur d'Alene River that served mining camps in the Silver Valley. App. 69. A portion of the transported goods consisted of liquor. App. 69. When this liquor trade was discovered in 1886, the Department of Interior moved quickly to quash the transportation of liquor across the Lake, citing statutes prohibiting the introduction of liquor into "Indian country." App. 69. Around this same time, the Army began ejecting non-Indians using the lake for camping and fishing. App. 70.

Word of these actions apparently got back to Congress, for in 1888 the Senate passed the following resolution:

> Whereas it is alleged that the present area of the Coeur D'Alene Indian Reservation, in the Territory of Idaho, embraces 480,000 acres of land; that there are, according to the statistics in the Indian Bureau, only about 476 Indians in the tribe now occupying such reservation, or more than 1,000 acres to each man, woman, and child; that Lake Coeur D'Alene, all the navigable waters of Coeur D'Alene River, and about 20

miles of the navigable part of Saint Joseph River, and part of Saint Mary's, a navigable tributary of the Saint Joseph, are embraced within this reservation, except a shore-line of about 3½ miles at the north end of the lake, it being alleged that this lake and its rivers tributary constitute the most important highways of commerce in the Territory of Idaho, and are in fact the only navigable waters, except Snake River, now used for steam-boat navigation in the Territory; that all boats now entering such waters are subject to the laws governing the Indian country and all persons going on such lake or waters within the reservation lines are trespassers; and

Whereas it is further alleged that the Indians now on such reservation are located in the extreme southwest corner of the same around De Smedt Mission, near the town of Farmington, in Washington Territory, where the land is good for agriculture; and it being further alleged that all that part of such reservation lying between Lake Coeur D'Alene and Coeur D'Alene River and that part between the Coeur D'Alene River and Saint Joseph River is a territory rich in the precious metals and at the same time being of no real use or benefit to the Indians: Therefore,

Resolved, That the Secretary of the Interior be, and he is hereby, directed to inform the Senate as to the extent of the present area and boundaries of the Coeur D'Alene Indian Reservation in the Territory of Idaho; whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur D'Alene, and of Coeur d'Alene and St. Joseph Rivers; about what proportion of said reservation is agricultural, grazing and mineral land

> respectively; also the number of Indians occupying such reservation; also on what portion of such reservation the Indians now thereon are located; also whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States, and, if so, precisely what portion; and also whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation.

S. Misc. Doc. No. 36, 50th Cong., 1st Sess. (1888).

Several weeks later the Secretary of Interior responded by forwarding a report prepared by the Commissioner of Indian Affairs. The Commissioner's report concluded that "the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation which runs 'in a direct line' from the Coeur d'Alene Mission to the head of the Spokane River." S. Ex. Doc. No. 76, 50th Cong., 1st Sess. 3 (1888). The Commissioner then turned to the question of "whether it is desirable to release any of the navigable waters mentioned in the resolution from the limits of said reservation." *Id.* at 4. The Commissioner began by stating: "In approaching this question [of release of navigable waters], I deem it proper to refer briefly to the character and condition of the Indians occupying the reservation and the situation of affairs as existing amongst them." *Id.* at 5. He then went on to describe what was viewed by federal officials as a remarkable transformation in the Tribe's economy. He noted that members of the Tribe "cultivate the soil extensively, live in comfortable houses, dress like the whites, wear short hair, and in all other respects live and dress as

white people do . . . . They own large bands of cattle and horses and an abundance of hogs and poultry." *Id.* at 5.

The Commissioner concluded that "[t]here are few Indians in the entire country, if we except the five civilized tribes, who are as far advanced . . . . " *Id.* The Commissioner also noted that members of the Tribe did not reside by the Lake, stating his belief that "all, or nearly all" of the tribal members lived on farmlands in the Hangman's Creek area "lying south of the Lake Coeur d'Alene and St. Joseph River." *Id.* at 4. After reciting all the above facts relating to the Tribe's needs, the Commissioner concluded that:

> [M]y own opinion is that the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any land so taken.
>
> Just what portion of the reservation and navigable waters should be segregated from the reservation, I am unable to say. That, I think, should be determined by negotiations with the Indians.
>
> . . . .
>
> In conclusion I will state that in my opinion these Indians have all the original Indian rights in the soil they occupy. They claimed the country long before the lines of the reservation were defined by the executive order of 1873, and the present reservation embraces only a portion of the lands to which they laid claim. I think that when the present agreement [i.e., the 1887 Agreement] shall have been ratified it will be an

> easy matter to negotiate with them for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms.

Id. at 6-7.

Although the Commissioner of Indian Affairs recommended ratification of the 1887 Agreement prior to any new negotiations, Congress refused to do so, apparently because of the concern that such ratification would have confirmed the inclusion of the Lake within the Reservation.[4] Instead, Congress directed further negotiations with the Tribe for a cession of a portion of the Reservation. Act of March 2, 1889, 25 Stat. at 1002. As the court of appeals found, "the main purpose of the new negotiations was to regain from the Tribe whatever submerged lands it was willing to sell." App. 22, n.14.

The authorized negotiations were completed on September 9, 1889. 26 Stat. at 1030. The Tribe agreed to cede the northern portion of the Reservation. App. 7. The boundaries of the diminished Reservation bisected the Lake, with the southern third of the Lake remaining within the boundaries of the Reservation, while the

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[4] The House Committee on Indian Affairs reported that the 1887 Agreement was "not ratified for sundry reasons, among which was a desire on the part of the United States to acquire an additional area, to wit, a certain valuable portion of the reservation specifically dedicated to the exclusive use of said Indians under an Executive order of 1873 . . . [that] contains a magnificent sheet of water, the Coeur d'Alene Lake, and its chief tributary, to wit, the Coeur d'Alene River, over the waters of which steamers now ply daily." H.R. Rep. No. 1109, 51st Cong., 1st Sess. 4 (1890).

northern two-thirds of the Lake, along with the surrounding uplands, were excluded from the Reservation. App. 7; map, App. 99.

The 1889 Agreement, along with the still-unratified 1887 Agreement, were transmitted to Congress for ratification on December 18, 1889. H.R. Rep. No. 2988, 51st Cong., 1st Sess. 26 (1890). The Agreements were bundled as a package for consideration, partly because the Tribe had insisted on the inclusion of a provision stating that the 1889 Agreement would not be binding on either party until ratification of the 1887 Agreement. App. 8.

Although the Senate passed a bill ratifying the 1887 and 1889 Agreements on June 7, 1890, 21 Cong. Rec. 5769-70, the House did not hold a vote on the bill that year, and the Agreements were not ratified until passage of the Indian Department's 1891 annual appropriation bill on March 3, 1891. 26 Stat. at 1027, App. 87-98. In the interim, Congress had admitted Idaho as the 43rd State. Idaho Admission Bill, Act of July 3, 1890, 26 Stat. 215.[5]

As noted above, following its admission, Idaho exercised unfettered jurisdiction and rights of ownership over the submerged lands within the Reservation without challenge from the federal government. In 1991, however, the Coeur d'Alene Tribe brought a quiet title action against the State of Idaho in federal district court. The Tribe claimed ownership of submerged lands within both the current and former boundaries of the Coeur d'Alene

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[5] The Idaho State Constitution contains a provision disclaiming title to lands "owned or held by any Indians or Indian tribes." Idaho Const. art. 21, § 19. Although the district court cited this provision as supporting its decision, App. 81-82, the court of appeals, in reaching its conclusions, expressly disclaimed any reliance on this provision. App. 24.

Reservation. The Tribe's original claims against the State were dismissed as a violation of the State's sovereign immunity, an action later upheld by this Court in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). Following the initial dismissal of the Tribe's claims, the United States brought a quiet title action on the Tribe's behalf, in which the Tribe intervened. The United States invoked federal court jurisdiction under 28 U.S.C. §§ 1331, 1345, and 2202. The United States' action claimed title only to submerged lands within the current boundaries of the Coeur d'Alene Reservation, excluding submerged lands within Heyburn State Park, which lies within the Reservation boundaries. Following a two week trial, the federal district court for the District of Idaho issued a decision recognizing federal and tribal title to submerged lands within the current boundaries of the Coeur d'Alene Reservation, namely the lower third of Coeur d'Alene Lake and the lower reach of the St. Joe River. App. 31-86. The State appealed.[6] The court of appeals affirmed the district court's decision. App. 1-30.

The State seeks review of the court of appeals' decision and the restoration of the public's ownership of Coeur d'Alene Lake and the St. Joe River.

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[6] The Tribe also filed a cross-appeal relating to the district court's refusal to hear the Tribe's claims to submerged lands within Heyburn State Park, which were excluded from the United States' complaint. The court of appeals denied the cross-petition, and the State does not, in this petition, raise any issues relating to ownership of submerged lands within Heyburn State Park.

REASONS FOR GRANTING THE PETITION

1. Background.

As discussed in detail below, the court of appeals' decision presents irreconcilable conflicts with the decisions of both this Court and the Idaho Supreme Court. The depth of these conflicts is best appreciated against the background of this Court's prior submerged lands decisions. This Court has repeatedly affirmed that each State's ownership and control of the beds and banks of navigable waters is "an inseparable attribute of the equal sovereignty guaranteed to it upon admission [to the Union]." *United States v. Louisiana*, 363 U.S. 1, 16 (1960). Submerged lands possess a "perceived public character . . . which underlies and informs the principle that these lands are tied in a unique way to sovereignty." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 286 (1997).

Ownership of submerged lands is guaranteed to each individual State "by the Constitution itself." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).[7] Before the assumption of statehood, however,

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[7] The constitutional guarantee of state title to submerged lands arises under the principle that each state is admitted to the Union on an equal footing with the thirteen original states, so that all States "have the same rights, sovereignty and jurisdiction . . . as the original states possess within their respective borders." *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867). The original thirteen states own the lands underlying navigable waters within their boundaries as the sovereign successors to the English crown. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842). Thus, under the equal footing doctrine, all subsequently admitted states hold the same sovereign title to the lands underlying navigable waters within their respective boundaries. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845).

Congress, having the entire dominion and sovereignty over the territory, may convey specific submerged lands to third parties, or reserve perpetual federal ownership of specific submerged lands. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987); *United States v. Alaska*, 521 U.S. 1, 33-34 (1997). When Congress does so, it necessarily defeats the title of the future State to those same submerged lands. Congress' authority to defeat state title to submerged lands can only be exercised up to the point of statehood. Afterward, state title to submerged lands is absolute. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. at 374.

While Congress has the authority, during the territorial period, to defeat state title to submerged lands, congressional policy is to hold submerged lands "for the ultimate benefit of future States." *Utah Div. of State Lands*, 482 U.S. at 197, quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). Congress' policy of retaining submerged lands in trust for future States creates a "strong presumption against conveyance by the United States." *Montana v. United States*, 450 U.S. 544, 552 (1981). Because of this presumption, the Court will not infer an intent to defeat state title to submerged lands "unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. at 55.

When submerged lands are located within the exterior boundaries of a federal reservation, the Court has an even higher threshold for inferring intent to defeat state title, since "[t]he land remains in federal control, and therefore may still be held for the ultimate benefit of future States." *Utah Div. of State Lands*, 482 U.S. at 202. Thus, a court may not "infer an intent to defeat a State's equal footing entitlement from the mere act of reservation

itself." *Id.* Instead, the United States is required to establish (1) that there was a clear intent to include the submerged lands within the reservation, and (2) that "Congress affirmatively intended to defeat the future State's title to such land." *Id.*

Recently, the Court expanded its analysis to address reservations originally established by executive order. In such cases, the first prong of the test, intent to include submerged lands within the reservation, may be fulfilled by executive action. *United States v. Alaska*, 521 U.S. at 45-46. The second part of the test is fulfilled where Congress, after being put on notice that the executive reservation includes submerged lands, ratifies such inclusion. *Id.* at 44-45. An intent to ratify the reservation is found where Congress "explicitly recogniz[es], at the point of . . . statehood, an Executive reservation that clearly included submerged lands," *id.* at 44, or where Congress "acknowledged" continuing federal ownership of the reservation in the statehood act. *Id.* at 45. Congress must speak in plain language that "reflects Congress' intent to ratify the inclusion of submerged lands within the Reserve and to defeat the State's title to those lands." *Id.* at 46.

2. The court of appeals' decision presents irreconcilable conflicts with decisions of the Idaho Supreme Court.

The Idaho Supreme Court has repeatedly applied the above principles to affirm the State's title to the submerged lands of Coeur d'Alene Lake. In *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983), the court addressed a dispute over a grant, by the Idaho Department of Lands, of a lease of submerged lands for private docking facilities on Coeur

d'Alene Lake. In affirming the lease, the court confirmed that the "State of Idaho holds title to the beds of all navigable bodies of water below the natural high water mark for the use and benefit of the public." *Id.* at 1088. In *Erickson v. State of Idaho*, 970 P.2d 1 (Idaho 1998), the court reviewed a district court decision establishing the ordinary high water mark (OHWM) of Coeur d'Alene Lake. In doing so, it stated that "[i]t is well established that the State owns in trust for the public title to the bed of navigable water below the OHWM as it existed at the time the State was admitted into the Union." *Id.* at 3. In *Bowman v. McGoldrick Lumber Co.*, 219 P. 1063 (Idaho 1923), the court, in determining the rights of a littoral landowner, expressly recognized state title to the bed of Coeur d'Alene Lake. *Id.* at 1065.

Although the above decisions addressed situations arising outside the Coeur d'Alene Reservation, they affirmed state title to Coeur d'Alene Lake generally, making no distinction between Reservation and non-Reservation lands. The Idaho Supreme Court has also explicitly affirmed state title to submerged lands within the Reservation. *West v. Smith*, 511 P.2d 1326 (Idaho 1973), was an action by a littoral land owner to compel removal of a houseboat moored to pilings driven into the bed of Coeur d'Alene Lake. The littoral property was located within the exterior boundaries of the Coeur d'Alene Reservation, as was the lakebed.[8] The Idaho Supreme Court adopted

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[8] The legal description of the littoral property was Government Lot 3, Section 2, Township 47 North, Range 4 W, Boise Meridian. *West*, 511 P.2d at 1328. The land was described as "abut[ting] the westerly shore of Lake Coeur d'Alene." *Id.* The described land lies within the exterior boundaries of the Reservation, and the adjacent lakebed lies plainly within that portion of the lakebed that was adjudicated in the decisions that are the subject of this petition.

the district court's finding that the "houseboat and the pilings to which it is moored are located below the natural high water mark of the lake on lands belonging to the State of Idaho." *Id.* at 1329. In adopting the district court's finding, the court reiterated that "[t]he State of Idaho holds title to the beds of all navigable bodies of water below the natural high water mark for the use and benefit of the whole people." *Id.* at 1330. As authority, the court cited the equal footing language in the Idaho Admission Bill and this Court's decision in *Shively v. Bowlby*, 152 U.S. 1 (1894). *Id.* at 1330 n.1. The court also affirmed that "[s]ubject to regulation by the State, the public is entitled to use the waters of Lake Coeur d'Alene for navigational and recreational purposes." *Id.* at 1331.

It is impossible to reconcile the court of appeals' decision, which recognizes federal and tribal ownership of the lower third of Coeur d'Alene Lake, with the *West* decision, which expressly recognized State ownership and regulation of that same portion of the Lake. The court of appeals' decision also conflicts with the State's exercise, over the last 100 years, of legislative and judicial jurisdiction over Coeur d'Alene Lake and the St. Joe River, based on the assumption of State ownership. The Court should grant the petition for certiorari and resolve this conflict.

3. The court of appeals' decision presents irreconcilable conflicts with decisions of this Court.

In addition to the demonstrated conflicts with the decisions of the Idaho Supreme Court, the court of appeals' decision conflicts directly with this Court's decision in *United States v. Alaska*, 521 U.S. 1 (1997). The *Alaska* decision established an analysis for determining

whether Congress intended to defeat state title to submerged lands previously reserved by executive order. While conflicts between this Court and a circuit court of appeals are not normally fertile ground for review on certiorari, there are unique circumstances to this case which mandate such review. First, States within the Ninth Circuit are, by virtue of their large number of reservations and their later admission to the Union, placed in the particular circumstance of having to assert and defend claims to submerged lands within federal reservations. A large number of these reservations were created by executive orders issued during the territorial period. Thus, due to geographic and historical circumstances, challenges to state title to submerged lands within executive order reservations have, to date, been peculiar to the States within the Ninth Circuit. *See, e.g., Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984) (addressing submerged lands within executive order addition to treaty reservation); *Muckleshoot Indian Tribe v. Trans-Canada Enterprises*, 713 F.2d 455 (9th Cir. 1983), *cert. denied*, 466 U.S. 1049 (1984) (addressing submerged lands within executive order expansion of treaty reservation); *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983), *cert. denied*, 464 U.S. 982 (1983) (addressing submerged lands within executive order addition to statutory reservation); *United States v. Alaska*, 423 F.2d 764 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970) (addressing submerged lands within wildlife refuge created by executive order); *Skokomish Indian Tribe v. France*, 320 F.2d 205 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964) (addressing submerged lands within executive order reservation); *Moore v. United States*, 157 F.2d 760

(1946), *cert. denied*, 330 U.S. 827 (1947) (addressing submerged lands within executive order reservation). Outside of the Ninth Circuit, state title to submerged lands within executive order reservations apparently has not been challenged. Thus, conflicts with other circuits may never appear, and an issue critical to the sovereignty of many western States may escape review.

Another unique circumstance is that the primary conflict alleged herein is between the decision below and a decision issued by this Court while exercising its *original* jurisdiction, *United States v. Alaska*, 521 U.S. 1 (1997). In many ways, the situation is analogous to a conflict between circuits. When exercising its original jurisdiction, the Supreme Court is in much the same posture as a circuit court of appeals, since its review is only one step removed from the fact-finding of the special master typically appointed to hear original jurisdiction cases. Thus, decisions in original jurisdiction cases tend to be more dependent on factual findings than is typical of decisions heard on certiorari, which have been distilled through an additional layer of appellate review before being heard by the Supreme Court. By nature, original jurisdiction decisions are not intended to provide national guidance or establish rules of general applicability.

The concept that original jurisdiction decisions tend to be fact-specific and of narrow applicability is certainly demonstrated by the *Alaska* decision, which was based on circumstances and provisions unique to the Alaska Statehood Act. Without careful attention to its details, attempts to apply the *Alaska* decision to other circumstances may result in the misconception that the Court lowered the thresholds that must be met to infer congressional intent to defeat state title to submerged lands. Indeed, when extended to circumstances outside the

unique context of the Alaska Statehood Act, as happened here, much of the language of the *Alaska* decision can be readily misapplied. As described in further detail below, the court of appeals' misapplication of the holdings in *Alaska* creates a series of conflicts that should be resolved through the granting of the petition for certiorari.

4. The court of appeals' decision conflicts with this Court's decisions holding that Congress must affirmatively intend to defeat state title to submerged lands within federal reservations.

The court of appeals focused on one particular fact to support its holding: the fact that after being informed that the Coeur d'Alene Reservation included navigable waters, Congress authorized negotiations to secure the release of some or all of the waters from the Reservation. The court of appeals concluded that:

> Congress' course of conduct in ascertaining in 1888 that the Executive construed the reservation to include submerged lands and then authorizing negotiations in 1889 to purchase and thereby recover whatever portion of those lands the Tribe was willing to sell demonstrates its acknowledgement that beneficial ownership of the lands had passed to the Tribe.
>
> . . . .
>
> Although Congress had the opportunity and the power to repudiate the executive reservation, and the 1887 agreement, it did not do so. Instead, in 1889 it took affirmative action, choosing to authorize negotiations – with few limitations aside from an instruction to acquire non-agricultural lands – "for the purchase *and release* by said tribe of such portions of *its reservation* . . . as such tribe *shall consent to sell*" (emphasis added). Act of March 2, 1889, 25 Stat.

> 980, 1002. The express reference to the reservation as *the Tribe's reservation*, explicit recognition that the choice to sell was the Tribe's, and reference to *tribal release* of portions of *its reservation* all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation – boundaries that included submerged lands.

App. 21-22 (footnote excluded).

The court of appeals' conclusions conflict with this Court's decision in *Alaska* in a number of ways. First, it ignores this Court's requirement that Congress must act affirmatively to defeat state title to submerged lands. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987) (United States must "establish that Congress affirmatively intended to defeat the future State's title to [submerged] land"); *Alaska*, 521 U.S. at 41 (adopting *Utah* standard). An affirmative intent to defeat state title to submerged lands within federal reservations requires that Congress make plain its intent that federal ownership would continue *after* statehood. In *Alaska*, this Court was careful to find that in regards to both reservations at issue, Congress clearly contemplated that its action would defeat state title and result in continued federal ownership after statehood. *See* 521 U.S. at 42 ("Section 11(b) [of the Statehood Act] thus reflects a clear congressional statement that the United States owned and would continue to own submerged lands included within the Reserve"); *id.* at 57 ("In § 6(e) of the Statehood Act, Congress clearly contemplated continued federal ownership of certain submerged lands . . . . ").

In *Alaska*, Congress' intent to retain title to submerged lands after statehood was explicit, because the retention of submerged lands occurred in the context of a statehood act, and more specifically, the Alaska Statehood

Act, which is unique in that one of its primary purposes was to allocate ownership of public lands between the state and federal governments. *See Alaska*, 521 U.S. at 1916 (noting that § 6(e) of Alaska Statehood Act transferred certain lands to Alaska and retained certain lands in federal ownership); *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 549-50 (1987) (discussing the "allocation" of public lands in the Alaska Statehood Act and follow-up statutes). The Act's express allocation of reserved lands that clearly included navigable waters allowed this Court to conclude that "Congress clearly contemplated continued federal ownership of certain submerged lands . . . . " *Alaska*, 521 U.S. at 57.

The court of appeals, however, failed to recognize that the retention of federal ownership of submerged lands in a pre-statehood act does not necessarily imply an intent for such ownership to continue after statehood. In contrast to the Alaska Statehood Act, the act at issue here was not intended to allocate public lands between federal and state ownership. Rather, it simply directed negotiations to modify the Reservation boundaries prior to congressional approval of the pending agreement. While Congress was clearly motivated by a desire to secure the immediate release of at least some of the Lake from its status as "Indian country," there is nothing in the legislative history to suggest that it affirmatively intended that the remainder of the Lake would not later pass into State ownership. Indeed, the court of appeals made no finding that Congress "clearly contemplated" continued federal ownership of submerged lands after statehood, nor could it. The court of appeals simply ignored this Court's requirement that Congress must specifically contemplate the defeat of state title. Defeats of state title cannot be

inadvertent. The petition for a writ of certiorari should be granted to resolve this conflict.

5. The court of appeals' decision conflicts with this Court's decisions holding that a defeat of state title to submerged lands within a reservation should not be inferred unless continued federal ownership after statehood is necessary to achieve the purposes of the reservation.

In determining whether Congress intended to defeat state title to submerged lands within the Coeur d'Alene Reservation, the court of appeals expressly declined to examine the purpose of the reservation as understood by Congress. The court stated:

> The State's argument that the district court should have determined the purpose of the reservation as understood by Congress (rather than the Executive), and as so understood in 1889 (rather than 1873) lacks support in the case law. . . . What mattered was that Congress recognized that the executive reservation included submerged lands, not that it knew or acknowledged the executive purpose in reserving them.

App. 18.

The court of appeals' holding was a radical departure from this Court's approach in the *Alaska* decision, where the Court stressed the need to examine the purpose of the reservation as an indication of whether Congress concluded that defeat of state title was necessary to meet federal objectives. In *Alaska*, the Court found that that the purpose of the petroleum reserve was to retain federal ownership of all "oil and gas deposits within the Reserve's boundaries," 521 U.S. at 39, and that "transfer of submerged lands at statehood – and the loss of ownership rights to the oil deposits beneath those lands –

would have thwarted that purpose." *Id.* at 43. Addressing the wildlife range, the Court found that "waters within the boundaries of the Range were an essential part of the habitats of the species the Range was designed to protect, and that retention of lands underlying those waters was critical to the Government's goal of preserving these aquatic habitats." *Id.* at 52. The Court also distinguished prior decisions, such as that in *Utah Div. of State Lands*, finding that in *Utah* continued federal ownership of Utah Lake after statehood was not necessary for fulfillment of the federal goal of developing a reservoir. *Id.* at 38. Likewise, the Court noted that "[i]n *Montana* [*v. United States*], we reasoned that a conveyance of a beneficial interest in submerged lands beneath a river on the Crow Reservation would not have been necessary to achieve the Government's purpose in creating the reservation, because fishing was not important to the Crow Tribe's way of life." *Id.* at 52.

Clearly, the *Alaska* Court examined the purpose of the reserves at issue as a method of determining *congressional* intent. 521 U.S. at 42-43 (discussing purposes of oil reserve as aid to interpretation of § 11(b) of the Statehood Act); *id.* at 56-57 (noting that the operative provision in § 6(e) of Statehood Act stated an express purpose of reserving lands for the "protection of wildlife"). Indeed, it could not be otherwise. Since the defeat of state title is an issue determined by congressional intent, the reviewing court must examine the objectives of the reservation as understood and defined by Congress. Thus, the analysis adopted in *Alaska* hinged on determining the objective of the reservation and finding that "defeating state title to submerged lands was necessary to achieve the United States' objective . . . . " *Id.* at 42.

Here, however, the court of appeals declined to determine Congress' understanding of the Reservation's purposes. Rather, it relied solely on the purposes of the Reservation as understood by the government agents whose actions precipitated the 1873 executive order. App. 17-19.[9] The court of appeals' approach cannot be reconciled with the *Alaska* decision. It is folly to assume that Congress, in approving a reservation, automatically adopts as its own the objectives of the executive, especially when the executive order establishing the reservation occurred many years before, and where, as here, the executive order was intended to be only temporary in nature. App. 35. It is especially folly in this instance, because Congress did not, prior to statehood, approve the Reservation as established by the prior Executive order. Instead, it purposefully withheld such approval, and directed the modification of the Reservation boundaries to exclude at least some of the submerged lands.

Congress' directive to modify the Reservation was plainly due to the fact that the original objectives which led to the inclusion of submerged lands were no longer valid. Both Congress and the Commissioner of Indian Affairs found that the living conditions of the Coeur

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[9] Notably, both the court of appeals and the district court looked only to the purpose of the reservation as understood "by the government's negotiators and agents," App. 19, not the purpose as understood by the persons actually involved in the decision to set aside the Reservation such as the President, the Secretary of the Interior, and the Commissioner of Indian Affairs. Indeed, the district court expressly rejected any need to determine the knowledge or understanding of the three primary decision-makers. App. 58, n.13. The result was that the court's determination of the purpose of the Reservation was even further removed from the objective of determining congressional intent.

d'Alene Tribe in 1889 had changed, as demonstrated in the 1888 Senate Resolution, which pointedly noted "the Indians now on such reservation are located in the extreme southwest corner of the same around De Smedt Mission, near the town of Farmington, in Washington Territory, where the land is good for agriculture . . . . " S. Misc. Doc. No. 36, 50th Cong., 1st Sess. (1888). In his response to the resolution, the Commissioner of Indian Affairs stated that in addressing the question of ownership of the Lake, "it [is] proper to refer briefly to the character and condition of the Indians occupying the reservation and the situation of affairs as existing amongst them." S. Ex. Doc. No. 76, 50th Cong., 1st Sess. 5 (1888). He then went on to describe the Tribe's agricultural successes. *Id.* After reviewing the Tribe's needs, the Commissioner concluded that "my own opinion is that the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of very great benefit to the public . . . . " *Id.* at 6.

Obviously, in the views of both Congress and the Commissioner of Indian Affairs, the Tribe's needs had changed since the Reservation's establishment in 1873, and such views were a critical factor in Congress' decision to negotiate modifications in the boundaries of the Reservation. It was anticipated that the primary purpose of the diminished reservation would be to provide for the Tribe's needs as an agricultural people. It was not happenstance that the sole directive in the 1889 Act authorizing new negotiations was that the executive branch seek "the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for

minerals and timber . . . . " Act of March 2, 1889, 25 Stat. 980 at 1002.

Congress' contemplation that the primary purpose of the diminished reservation would be to provide an agricultural land base for the Tribe was certainly a relevant factor to be considered. *See Montana v. United States*, 450 U.S. 544, 556 (1981) (finding that Congress had no need to depart from the policy of retaining submerged lands within Indian reservation for future States where fishing "was not important to [the tribe's] diet or way of life"). The obvious inference to be made from Congress' contemplation of the purposes of the Coeur d'Alene Reservation is that Congress did not, by authorizing negotiations with the Tribe, contemplate the need to defeat future state title to submerged lands to supply the needs of the Tribe. By ignoring this critical evidence of congressional intent, the court of appeals ignored the directive of this Court that the purpose of the reservation is a critical factor in determining whether Congress intended federal ownership of submerged lands to continue after statehood. *Alaska*, 521 U.S. at 39. The Court should grant certiorari to resolve this conflict.

6. The court of appeals' decision ignores the fact that Congress purposefully deferred its ratification of the Reservation until after statehood.

The court of appeals concluded that "[f]ormal ratification, prior to statehood, of the 1887 and 1889 agreements is not necessary for a finding of congressional intent to defeat state title." App. 20. Whatever truth this may have as a general statement, it ignores congressional intent relating specifically to the Coeur d'Alene Reservation. Congress itself had indicated, in express and specific

language, that the boundaries of the Coeur d'Alene Reservation would not be deemed as ratified or approved by Congress until Congress took specific and express action to do so.

The saga of congressional ratification began with the 1886 Act authorizing negotiations to extinguish the Tribe's claims of aboriginal title outside the 1873 Reservation. The authorization act provided that "no agreement made shall take effect until ratified by Congress." Act of May 15, 1886, 24 Stat. 29 at 44. Thus, the process began with Congress clearly reserving to itself the right to review the executive branch's actions and to hold those actions in abeyance until formally ratified.[10]

Congress' caution was well warranted. Article 5 of the 1887 Agreement provided that

> In consideration of the foregoing cession and agreements, it is agreed that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians . . . and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation."

App. 89. Congressional ratification of this provision would have represented a significant change in the status of the Reservation, since at the time "the rights and interests which the Indians enjoyed in executive order reservations were different from and less than their rights

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[10] In accordance with Congress' directions, the negotiators of the 1887 Agreement included a provision mirroring the language in the authorization act. Article 14 of the 1887 Agreement stated that: "This agreement shall not be binding upon either party until ratified by Congress." App. 92.

and interests in treaty or statute reservations. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 327 (1942).

Armed with the knowledge that its ratification would permanently alter and strengthen the Tribe's title to lands within the Reservation, Congress, upon being informed by the Commissioner of Indian Affairs that the Reservation included navigable waters, expressly withheld its ratification of the 1887 Agreement until the issue could be resolved to the satisfaction of Congress. The House Committee on Indian Affairs reported that:

> The 1887 Agreement was presented to the Fiftieth Congress, but not ratified for sundry reasons, among which was a desire on the part of the United States to acquire an additional area, to wit, a certain valuable portion of the reservation specifically dedicated to the exclusive use of said Indians under an Executive order of 1873 . . . [that] contains a magnificent sheet of water, the Coeur d'Alene Lake, and its chief tributary, to wit, the Coeur d'Alene River, over the waters of which steamers now ply daily . . . .

H.R. Rep. No. 1109, 51st Cong., 1st Sess. 4 (1890).

In lieu of ratification, Congress directed further cession negotiations with the Tribe. The object of these negotiations "was to regain from the Tribe whatever submerged lands it was willing to sell." App. 22, n.14. Once again, Congress directed that any agreement reached with the Tribe would be of no effect until ratified by Congress. The 1889 Act authorizing negotiations for the cession of a portion of the 1873 Reservation provided that the "purchase shall not be complete until ratified by Congress." Act of March 2, 1889, 25 Stat. at 1002. This language is also reflected in Article 4 of the 1889 Agreement, which provides that:

> It is further agreed and understood that this agreement shall not be binding on either party until the former agreement now existing between the United States by the duly-appointed commissioners and the said Coeur d'Alene tribe of Indians, bearing date March twenty-sixth, eighteen hundred and eighty-seven, shall be duly ratified by Congress; and in the event of the ratification of the aforesaid agreement of March twenty-sixth, eighteen hundred and eighty-seven, then this agreement to be and remain in full force and effect but not binding on either party until ratified by Congress.

App. 95.

Congress itself defined the circumstances under which it would ratify and approve the boundaries of the Coeur d'Alene Reservation, while clearly signaling that its authorization of negotiations should not be deemed as approval of the Reservation. Indeed, the House Committee on Indian Affairs reported that Congress refused to ratify the 1887 Agreement for the very reason that its boundaries embraced navigable waters. H.R. Rep. No. 1109, 51st Cong., 1st Sess. 4 (1890). Yet, the court of appeals interpreted the 1889 authorization act as ratifying the 1873 boundaries so as to include the same navigable waters that were the reason for the express withholding of ratification. Such an interpretation cannot be squared with the objectives underlying the 1889 act, and conflicts with this Court's repeated directive that Congress must act "affirmatively" to defeat state title to submerged lands. The petition for certiorari should be granted to resolve this conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2000

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, In re suit to quiet title to that portion of the bed and banks of Coeur d'Alene Lake and the St. Joe River lying within the exterior boundaries of the 1873 Coeur d'Alene Reservation, *Plaintiff-counter-defendant, Appellee* v. STATE OF IDAHO, *Defendant-counter-claimant, Appellant-Cross-Appellee,* v. COEUR D'ALENE TRIBE OF IDAHO, *Plaintiff-intervenor, Appellee-Cross-Appellant*	Nos. 98-35831 98-35847 D.C. No. CV-94-00328-EIL OPINION

Appeals from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted
December 9, 1999 – Seattle, Washington

Filed May 2, 2000

Before: Thomas M. Reavley,[1] Stephen Reinhardt, and M. Margaret McKeown, Circuit Judges.

COUNSEL

Steven W. Strack, Deputy Attorney General, Natural Resources Division, Boise, Idaho, for defendant-counter-claimant, appellant-cross-appellee State of Idaho.

Hank Meshorer, United States Department of Justice, Environmental and Natural Resources Division, Washington, D.C., for plaintiff-counter-defendant, appellee United States of America.

Raymond C. Givens, Brian J. Cleary, Givens, Funke & Work, Coeur d'Alene, Idaho, for plaintiff-intervenor, appellee-cross-appellant Coeur d'Alene Tribe of Idaho.

OPINION

McKEOWN, Circuit Judge:

At issue in this case is the ownership of submerged lands lying within the present-day boundaries of the Coeur d'Alene Indian Reservation, which was originally set aside by executive order in 1873. After a nine-day trial involving multiple expert and lay witnesses, extensive written reports, scientific studies, and historical documents, the district court issued a lengthy and meticulous

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[1] The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

decision in which it concluded that the United States retained these submerged lands for the benefit of the Coeur d'Alene Indian Tribe (the "Tribe"). The court thus entered an order quieting title to the beds and banks of the Coeur d'Alene Lake (the "Lake") and the St. Joe River[2] (collectively, the "submerged lands") in favor of the United States, as trustee, and the Tribe, as the beneficially interested party of the trusteeship. The State of Idaho (the "State") appeals that order along with related orders giving the Tribe exclusive right to these submerged lands. We affirm the judgment of the district court. Congress's course of conduct in the late 1880s – in the years immediately preceding Idaho's statehood in 1890 – demonstrates that it intended to defeat the State's title to submerged lands within the 1873 reservation.

The Tribe cross-appeals the district court's refusal to adjudicate the ownership of other submerged lands located within what is now Heyburn State Park (the "Park"). These lands were part of the Tribe's reservation until 1911, when the United States conveyed them to Idaho to establish a park. We affirm the court's decision with respect to the Park because the complaint, read as a whole, excludes lands within the Park and the United States expressly disclaimed any intent to quiet title to such lands.

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[2] Referred to in certain historical documents as the St. Joseph River.

BACKGROUND

The district court's extensive Memorandum Decision and Order lays out the general historical backdrop to this case as well as extensive findings of fact. The State has not challenged the district court's factual findings, nor has it challenged the court's conclusion that executive actions reflect a clear intent to include the submerged lands within the 1873 reservation.[3] We thus discuss the factual background only as it relates to the main issue in this case, namely, whether Congress intended to defeat the State's title to these submerged lands.

In 1867, more than thirty years before Idaho became a state, a reservation embracing at best a small portion of the Lake was established by executive order. The Tribe was not even aware of this order until after it sent a petition in 1871 to the Commissioner of Indian Affairs (the "Commissioner") requesting a charter for a reservation. Thereafter, the Tribe refused to settle within the confines of the 1867 reservation because it did not include the Tribe's mission or waterways. After learning of the 1867 executive order, the Tribe sent a second petition, in 1872, to the Commissioner, requesting inclusion of the mission and the St. Joe and Coeur d'Alene river valleys. The Tribe's request was based in part on its continuing dependence on water resources; as it noted in its petition, "for a while yet we need have some hunting and fishing."

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[3] For purposes of this appeal, the State concedes that the 1873 executive order was intended to reserve title to the submerged lands for the benefit of the Tribe.

Congress responded in 1873 by authorizing a commission to negotiate with the Tribe for settlement on a reservation. After negotiations, the Tribe agreed to settle within an area considerably larger than the 1867 reservation. The new boundaries included the Coeur d'Alene and St. Joe Rivers as well as the vast majority of the Lake (the "1873 reservation"). An executive order, dated November 8, 1873,[4] set aside this area for the Tribe pending ratification of the 1873 agreement, which was contingent on congressional approval, but such approval never came. All subsequent executive and congressional action taken with regard to the reservation nonetheless operated from the understanding that its boundaries were as stated in the 1873 agreement and executive order.[5]

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[4] Executive Orders Relating to Indian Reservations, From May 14, 1855 to July 1, 1912, Washington, D.C., Government Printing Office (1912) at 72.

[5] For instance, an 1883 government survey located the reservation's northern boundary across the Lake, consistent with the 1873 agreement and executive order; the Executive dealt with both commercial and recreational use of the Lake by non-Indians on the assumption that the laws governing Indian territory governed; Congress spoke of the 1873 reservation as "set apart for the use of the Coeur d'Alene Indians by executive order" and described its borders in an 1888 act granting a railroad a conditional right-of-way through the reservation, Act of May 18, 1888, 25 Stat. 160; Congress referenced the 1873 boundaries in its 1886 authorization of negotiations "for the cession of their lands outside the limits of the present Coeur d'Alene reservation," Act of May 15, 1886, 24 Stat. 29, 44; and Congress again referenced the 1873 boundaries in its 1889 authorization of negotiations "for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell. . . . " Act of March 2, 1889, 25 Stat. 980, 1002.

In 1885, spurred by concerns due to increasing white settlement pressure, the Tribe again contacted the Commissioner, requesting confirmation of the 1873 reservation and compensation for lands outside that reservation but within the Tribe's aboriginal territory. Congress responded in 1886 by authorizing negotiations with the Tribe "for the cession of their lands outside the limits of the present Coeur d'Alene reservation." Act of May 15, 1886, 24 Stat. 29, 44. Negotiations were undertaken in 1887, and the Tribe agreed to cede its aboriginal title "to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation" (the "1887 agreement"). Act of March 3, 1891, 26 Stat. 989, 1027 (reciting 1887 agreement). This agreement, like the 1873 agreement, required ratification.

While the 1887 agreement was pending before Congress, pressure to open up at least part of the reservation to the public (particularly the Lake), prompted the Senate to pass a resolution in 1888 inquiring of the Secretary of the Interior about the boundaries of the Tribe's reservation and "whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers." S. Res. Mis. Doc. No. 36, 50th Cong. (1888). The Senate also sought advice about "whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation." *Id.* Two weeks later, the Secretary replied, stating that the 1873 reservation included the submerged lands at issue and attaching a report by the Commissioner; this report informed Congress that

"the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation" and that portions of the Coeur d'Alene and St. Joseph Rivers flowed through the reservation. Letter from the Secretary of the Interior, S. Ex. Doc. No. 76 at 3, 50th Cong. (1888). The Commissioner opined that "changes could be made in the boundaries for the release of some or all of the navigable waters" and that it would be "an easy matter" to negotiate a cession of the reservation, "including all or a portion of the navigable waters," once the 1887 agreement had been ratified. *Id.* at 2.

After receiving this response, Congress authorized a third round of negotiations, this time "for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell. . . . " Act of March 2, 1889, 25 Stat. 980, 1002. Following negotiations, the Tribe agreed to cede the approximate northern third of its 1873 reservation to the United States; this area included roughly the northern two-thirds of the Lake (the "1889 agreement").[6] Act of March 3, 1891, 26 Stat. 989, 1030 (reciting 1889 agreement). The 1889 agreement, like

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[6] The Tribe's chief insisted on carefully defining the new proposed boundaries, rejecting the suggestion that the "lake belongs to [the Tribe] as well as to the whites." Message from the President of the United States, S. Ex. Doc. No. 14, 51st Cong. (1889), at 9. A government negotiator then explained the proposed boundaries as follows: "[I]f we buy this land you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River." *Id.*

the 1873 and 1887 agreements, required ratification, and, as a condition, the Tribe insisted that the 1887 agreement be ratified. The map submitted to Congress along with the written terms of the agreement showed the boundary of the reservation as bisecting the Lake from west to east at its southern third.

Congress formally ratified both the 1887 and 1889 agreements, but not until 1891, Act of March 3, 1891, 26 Stat. 989, nine months after Idaho's admission to the Union. Idaho Admission Bill, Act of July 3, 1890, 26 Stat. 215. This statehood act also "accepted, ratified, and confirmed" the Idaho constitution, *id.* § 1, which disclaims the State's "right and title to . . . all lands lying within said limits owned or held by any Indians or Indian tribes." IDAHO CONST. art. XXI, § 19.

Prior to Idaho's admission, the House introduced and the Senate passed separate but identical bills[7] ratifying the 1887 and 1889 agreements, but due to uncertainty in the House over whether the bills were the same, the House tabled the Senate bill pending investigation of this question, 21 CONG. REC. 5905 (1890), which was ultimately resolved in the affirmative, H.R. REP. NO. 2988, 51st Cong., at 1 (1890). Two House reports, which recommended passage of the bill, *see id.* and H.R. REP. NO. 1109, 51st Cong., at 5 (1890),[8] and which indicate recognition of the submerged lands as part of the Tribe's reservation at

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[7] H.R. 7703, 51st Cong. (1890); S. 2828, 51st Cong. (1890), 21 CONG. REC. 5769 (1890).

[8] H.R. REP. NO. 2988 contains a reprint of H.R. REP. NO. 1109.

the time of statehood, further explained that the 1887 agreement had not been ratified when first presented

> for sundry reasons, among which was a desire on the part of the United States to acquire an additional area, to wit, a certain valuable portion of the reservation specifically dedicated to the exclusive use of said Indians under an Executive order of 1873 . . . [that] contains a magnificent sheet of water, the Coeur d'Alene Lake, and its chief tributary, to wit, the Coeur d'Alene River, over the waters of which steamers now ply daily. . . . It also controls the outlet of said lake, to wit, the Spokane River.

H.R. REP. NO. 1109, at 4, *reprinted in* H.R. REP. NO. 2988, at 5.

Today, the boundaries of the reservation remain as established in the 1887 and 1889 agreements, with two exceptions: 1) the Harrison cession (negotiated by agreement in 1894), a strip of land running from the mouth of the Coeur d'Alene River to the reservation's eastern boundary and including a defined chunk of the Lake; and 2) the Park, an area transferred to Idaho by Congress in 1911 and embracing three smaller lakes adjacent to the southern end of the Lake.

The United States, seeking to quiet title to submerged lands within the present-day reservation, initiated this action in its own capacity and as trustee for the Tribe. The district court granted the Tribe's motion to intervene, subject to the limitation that the suit would encompass only those submerged lands put at issue by the parties' pleadings. The court declined the Tribe's request that it

adjudicate the ownership of submerged lands within the Park.

Following trial, the district court ruled in favor of the United States and the Tribe on the quiet title action. The court found that the submerged lands lay within the boundaries of the present-day reservation, that in 1873 the Tribe depended on the Lake and associated rivers for a significant portion of its fishing needs, and that in 1873 the federal government was aware of this dependence. The court then concluded that the Executive intended to reserve submerged lands within the 1873 reservation for the benefit of the Tribe. The State has challenged neither these factual findings nor the court's legal conclusion on executive intent.

The court also found that Congress was on notice, prior to Idaho statehood, that the Executive had reserved the submerged lands within the 1873 reservation for the benefit of the Tribe; that the "northern boundary line of the diminished reservation was drawn [in the 1889 agreement] so as to bisect the Lake"; and that the minutes of the 1889 negotiations showed that this placement was "for the purpose of establishing the Tribe's right to the Lake and rivers." Looking at events between 1873, after the executive order established the reservation within which the Tribe had agreed to settle, and 1890, the year Idaho entered the Union, the court concluded that Congress ratified the 1873 executive reservation of submerged lands. The court explained that "[b]y explicitly recognizing, prior to Idaho's statehood, an Executive reservation that included submerged lands, Congress demonstrated a clear intent to defeat the State's equal footing

title." It is this conclusion that the State challenges on appeal.

ANALYSIS

We review de novo the district court's interpretation of treaties, statutes, and executive orders. *See Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996); *United States v. Washington*, 157 F.3d 630, 642 (9th Cir. 1998) (meaning of treaty language is question of law, reviewed de novo). Findings of historical fact, including the district court's findings regarding treaty negotiators' intentions, are reviewed for clear error. *See United States v. Washington*, 157 F.3d at 642. Because the State does not appear to have challenged any of the court's underlying factual findings, we accept the facts as given and note that they are amply supported by the record.

Juxtaposed in this case are two principles, both of which must be accorded due weight: the canon of construction favoring Indians and the presumption under the Equal Footing Doctrine that a State gains title to submerged lands within its borders upon admission to the Union. *See Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1257 (9th Cir. 1983) (stating that, "when faced with a claim [to submerged lands] by an Indian tribe . . . , we must accord appropriate weight to both the principle of construction favoring Indians and the presumption that the United States will not ordinarily convey title" to such lands).

The Supreme Court's trilogy of decisions in *United States v. Alaska*, 521 U.S. 1 (1997), *Utah Division of State*

Lands v. United States, 482 U.S. 193 (1987), and *Montana v. United States*, 450 U.S. 544 (1981), provides the framework for analyzing whether a state's presumptive title to submerged lands within its borders has been defeated. In *Alaska*, the Supreme Court reaffirmed the two-prong test set forth in *Montana* and *Utah* for determining whether a state's presumptive equal footing title to submerged lands within its borders has been defeated. As framed by the Supreme Court, the question before us is "whether the United States intended to include submerged lands within the [reservation] and to defeat [Idaho's] title to those lands." *See Alaska*, 521 U.S. at 36.

Although executive action has now been held sufficient to establish the first prong, the second prong requires a showing of congressional intent. *See Alaska*, 521 U.S. at 40-41, 44. Nothing in *Alaska* requires that congressional action take the form of explicit congressional ratification of an agreement reserving or conveying title to particular submerged lands. Rather, the Supreme Court has framed the question as whether Congress intended to defeat the state's title to the lands at issue, *see id.* at 36; *Utah*, 482 U.S. at 202; notably, the Supreme Court has not required that the requisite intent be established in any specific, formulaic way, focusing instead on whether the congressional action at issue showed an affirmative intent to defeat state title, that is, whether the "intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). As the Court in *Alaska* pointed out in rejecting the state's argument to the contrary:

> [T]here would have been no barrier to Congress retaining a petroleum reserve, including submerged lands, at the point of Alaska's statehood, provided it satisfied *Utah['s]* . . . requirements of demonstrating a clear intent to include submerged lands within the Reserve's scope and a clear intent to defeat Alaska's title. It follows that Congress could achieve the same result by explicitly recognizing, at the point of Alaska's statehood, an executive reservation that clearly included submerged lands.

Alaska, 521 U.S. at 44.

Given the State's concession, for purposes of this appeal, that the 1873 executive order was intended to convey or reserve title to submerged lands, we focus on the second prong – whether Congress demonstrated an intent to defeat the State's title to the submerged lands. We conclude that Congress's actions prior to statehood clearly indicate its acknowledgment, express recognition, and acceptance of the executive reservation, thereby establishing its intent to defeat the State's title. Accordingly, we affirm the district court's ruling quieting title to submerged lands within the present-day Coeur d'Alene Reservation for the benefit of the Tribe. In light of our decision, we need not reach the Tribe's alternative arguments for affirmance.

I. The State's Appeal – Submerged Lands

Relying on the events leading up to and surrounding the 1889 negotiations, the district court held that Congress demonstrated a clear intent to defeat the State's equal footing title. In particular, the court found that

Congress was on notice that the executive reservation included submerged lands and that its 1889 authorization of negotiations with the Tribe for a cession of tribal property constituted recognition and validation of the executive reservation. Idaho argues that none of the events leading up to its statehood in 1890 constitute affirmative ratification of the executive intent to convey or reserve the submerged lands and thus cannot show congressional intent to defeat state title to these lands.

In any submerged lands/equal footing case, a court must begin with a strong presumption against defeat of a state's title. *See Alaska*, 521 U.S. at 34. The Supreme Court has emphasized, however, that the question of whether title to submerged lands rests with a state is "ultimately a matter of federal intent." *Id.* at 36.

In *Alaska* itself, the Court held that the United States reserved title to the submerged lands within a petroleum reserve created by executive order 35 years prior to Alaska's statehood, *see id.* at 32-46, and to submerged lands within a wildlife refuge set aside by agency action (via an application and regulations) prior to statehood but not approved until after statehood, *see id.* at 46-61. In finding that the United States intended to include submerged lands within these reserved areas and to defeat state title to the lands, the Court emphasized that: 1) the reserves' boundaries were drawn so as necessarily to include the submerged lands, *see id.* at 36, 51; 2) the purpose of the reserves would have been defeated had the lands not been included, *see id.* at 39, 51-52; and 3) Congress included language in the Alaska Statehood Act indicating that it retained Enclave Clause authority to the petroleum reserve, *see id.* at 41-42, and title to lands

withdrawn or otherwise set aside as refuges for the protection of wildlife, *see id.* at 55-56.

In this case, several similar factors counsel the same result.[9] First, in both 1873 and 1889, the boundaries of the reservation were drawn so as necessarily to include submerged lands. Second, the purpose of the reservation would have been defeated had it not included these lands. Third – and this is the crux of the case – the series of congressional actions taken in the late 1880s (ascertaining that the Executive construed the reservation to include submerged lands and authorizing negotiations to recover whatever portion of the lands the Tribe was willing to sell) shows that Congress acknowledged that beneficial ownership of the lands had already passed to the

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[9] We recognize that, in *Alaska*, the Supreme Court discussed the first two factors identified here – namely, the purpose of the reserves and the fact that their boundaries were drawn so as necessarily to include submerged lands – mainly with respect to whether the United States intended to include the submerged lands within the reserves. These factors likewise support a finding of executive intent to include in this case, as the State concedes for purposes of appeal. We also discuss these factors with respect to the "intent to defeat" prong for two reasons. First, the State argued that *Alaska* involved a "unique combination of necessity, purpose, and explicit statutory language" and also argued that the district court short-circuited the "purpose" analysis by "failing to determine Congress' [s] understanding of the purpose of the Reservation at the time of the alleged ratification of the 1873 Executive order." Second, under the circumstances of this case, Congress's knowledge of the scope of the executive reservation – in particular, the boundaries of the reservation and the fact that they included submerged lands – is crucial. Accordingly, it is helpful to outline precisely what information Congress had before it.

Tribe. Congress's post-statehood actions also reflect recognition and confirmation of the passage of submerged lands to the Tribe. Both before and after statehood, Congress affirmatively treated the submerged lands as reserved for the Tribe.

We begin with the manner in which the boundaries of the reservation were determined. The reservation, which physically encompassed the submerged lands at issue, was created by a pre-statehood, 1873 executive order that drew the boundaries so as necessarily to include submerged lands. Crucial to the Tribe's acceptance of the 1873 reservation, as the district court found and the State does not dispute, was the inclusion of submerged lands. In addition, and significantly, when the 1873 boundaries were renegotiated in 1889, the "northern boundary line of the diminished reservation was drawn so as to bisect the Lake" specifically "for the purpose of establishing the Tribe's right to the Lake and rivers." The State likewise does not dispute this factual finding.

Both the Tribe and the agents sent out at the behest of Congress in 1889 understood the reservation to encompass submerged lands. As noted, the reservation's boundaries were redrawn by the 1889 agreement to split the lake – a fact recognized in the legal descriptions of the cession, the verbal explanation given to the Tribe,[10] and the maps submitted to Congress. As we recognized in

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[10] After the Tribe specifically rejected the suggestion that the "lake belongs to [it] as well as to the whites," a government negotiator told the Tribe that it "would still have the St. Joseph River and the lower part of the lake. . . . "

another case in which we upheld tribal claims to submerged lands under the half of a lake within the borders of a reservation, "[i]t would have been pointless, and quite likely deceptive, to have the northern boundary of the reservation bisect Flathead Lake unless it was intended to convey title to the southern half of that lake to the Indians." *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 962 (9th Cir. 1982) (further noting that "the most natural and intelligible way of understanding the boundary description is to infer an intent to convey the southern lake bed" and adopting this interpretation "in view of the Supreme Court's very frequent admonitions that doubtful language in Indian treaties must be construed in favor of the Indians and given the sense the Indians would have understood it to convey"). This observation is equally pertinent here, where the natural reading of all available documentation points to a purposeful division of the Lake.

Considering together the district court's undisputed factual findings, the canon favoring Indians, and the fact that both the 1873 and 1889 agreements drew boundary lines *across* the lake – an unusual practice, as the district court pointed out – the executive reservation and subsequent renegotiation could only have been meant and understood to convey title to submerged lands within the reservation's borders.

This conclusion finds further support in the fact that the purpose of the reservation would have been defeated had it not included submerged lands. As the district court found, and as the State does not challenge, the Tribe was dependent on its fisheries in 1873. The Tribe successfully insisted, both in 1873 and 1889, upon a reservation drawn

to include submerged lands. In 1873, the reservation was expanded from its 1867 borders because the Tribe refused to settle on lands that did not encompass the Lake and its associated waterways. In 1889, the borders of the reservation were contracted and redrawn – but redrawn so as to ensure that the Tribe still had beneficial ownership of the southern third of the Lake as well as the portion of the St. Joe River within the 1873 reservation.

The State's argument that the district court should have determined the purpose of the reservation as understood by Congress (rather than the Executive), and as so understood in 1889 (rather than 1873) lacks support in the case law. In *Alaska*, where the Supreme Court relied heavily on the purpose of the reserves at issue, the Court did not require either that Congress itself apprehend the purpose or that the purpose be extant at the time of congressional action. *See Alaska*, 521 U.S. at 39, 51-52. The Court examined the purpose of the petroleum reserve, for instance, with regard to the government's goal in 1923, when the Executive reserved the lands, rather than by reference to 35 years later when Congress passed the statehood act referencing its authority over the reserve. *See id.* at 39, 41-42. What mattered was that Congress recognized that the executive reservation included submerged lands, not that it knew or acknowledged the executive purpose in reserving them.[11] *See id.* at 44

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[11] Even cases specifically addressing tribal claims of right to submerged lands do not require that Congress apprehend the purpose of the reservation at the time it takes action recognizing the executive reservation. Rather, they focus on what the "United States" or the "government" knew as of the initial reservation. *See, e.g., United States v. Aam*, 887 F.2d 190, 195, 197

(providing for a showing that title to submerged lands does not pass to a state where Congress "explicitly recogniz[ed], at the point of . . . statehood, an executive reservation that clearly included submerged lands"). Thus, it is irrelevant that Congress may have believed the Tribe to have wholly or mainly converted to an agricultural lifestyle by 1889. Here there is no dispute that the government's negotiators and agents were aware of the Tribe's dependence on fishing in 1873. Indeed, even Congress was specifically on notice of this dependence as a result of the Tribe's second, 1872 petition. What matters, however, is Congress's awareness that the 1873 reservation included submerged lands, an issue about which there can be no doubt given the response to the 1888 resolution.

Turning now to the actions Congress took with respect to the reservation in the late 1880s, we conclude that this series of actions demonstrates acknowledgment,

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(9th Cir. 1990) (stating that "where courts have reviewed tribal claims of beneficial title to land under navigable waters, the inquiry focused on the circumstances surrounding the creation of the reservation" and noting "insufficient proof that the United States [by its officials or agents] perceived that the tribe depended on those particular tidelands"); *Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd.*, 713 F.2d 455, 458 (9th Cir. 1983) (stating that "the United States was clearly aware that the focus of the Muckleshoot's world was on the rivers along which they lived"; that "[t]he Government knew, at least by the date of the 1874 Executive Order expanding the Muckleshoot Reservation, that the Indians depended on watercourses"; and that "[t]he Government's Indian agents understood that [t]he capture of fish was an essential source of [the Indians'] food supply") (internal quotations omitted); *Puyallup Indian Tribe*, 717 F.2d at 1258 (noting "the Government's awareness of the importance of the water resource to the Tribe").

recognition, and acceptance of the boundaries of the 1873 reservation, which Congress knew the Executive had construed to include submerged lands, thereby showing the requisite intent to defeat state title.

Formal ratification, prior to statehood, of the 1887 and 1889 agreements is not necessary for a finding of congressional intent to defeat state title.[12] Neither the

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[12] Nor is inclusion of language in a statehood act – here the Idaho Admission Bill – specifying congressional intent to defeat state title necessary to a finding that Congress did, in fact, intend to defeat a state's title to particular submerged lands. In *Alaska*, the Supreme Court looked to the Alaska Statehood Act as a source of congressional intent in concluding that Congress intended to defeat Alaska's title to the petroleum reserve and wildlife refuge. *See Alaska*, 521 U.S. at 41-42, 55-56. Statehood acts, however, do not – and have never been held to – serve as exclusive sources of congressional intent with respect to the question of congressional intent to defeat state title.

We also note that there is significantly more evidence of congressional intent with regard to the submerged lands in this case than with regard to the wildlife refuge in *Alaska*. The Supreme Court found clear intent to defeat Alaska's title to the submerged lands within this wildlife refuge as a result of a fairly general provision of the Alaska Statehood Act. Under that provision, the United States retained "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." *Id.* at 47, 55. Not only had the refuge in *Alaska* not yet been approved at the time of statehood – an administrative application for withdrawal of the lands in the proposed refuge was still pending when Congress passed the statehood act and when Alaska subsequently entered the Union – but Congress took no action either prior to or at statehood specifically with regard to the refuge at issue. By contrast, in this case, before statehood, Congress was often and actively involved in deciding the fate of the submerged lands within the Tribe's reservation.

Supreme Court nor any of our cases require such a showing. Rather, the test is whether Congress clearly intended to defeat the State's title to submerged lands. Here, Congress's course of conduct in ascertaining in 1888 that the Executive construed the reservation to include submerged lands and then authorizing negotiations in 1889 to purchase and thereby recover whatever portion of those lands the Tribe was willing to sell demonstrates its acknowledgment that beneficial ownership of the lands had passed to the Tribe.

As the district court found, when Congress authorized these negotiations, it was clearly on notice that the 1873 executive reservation included submerged lands within its confines.[13] Congress also had the unratified 1887 agreement before it, an agreement that referenced the Tribe's "present [1873] reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation" and that secured the cession, pursuant to Congress's 1886 authorization, of aboriginal lands "outside the limits of the present [1873] Coeur d'Alene reservation."

Although Congress had the opportunity and the power to repudiate the executive reservation and the 1887 agreement, it did not do so. Instead, in 1889 it took affirmative action, choosing to authorize negotiations –

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[13] Similarly, Congress's 1888 passage of an act granting a railroad a right-of-way through the reservation, identified as "set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Reservation," and conditioned on the Tribe's consent, also supports congressional recognition of the 1873 reservation, which Congress by this point knew included submerged lands.

with few limitations aside from an instruction to acquire non-agricultural lands[14] – "for the purchase *and release* by said tribe of such portions of *its reservation* . . . as such tribe *shall consent to sell*" (emphasis added). Act of March 2, 1889, 25 Stat. 980, 1002. The express reference to the reservation as *the Tribe's reservation*, explicit recognition that the choice to sell was the Tribe's, and reference to *tribal release* of portions of *its reservation* all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation – boundaries that included submerged lands. This series of events indicates that Congress accepted the Secretary's advice to leave any cession up to negotiations. Indeed, the fact that Congress decided to make its authorization open-ended reinforces the district court's conclusion that Congress recognized and accepted the Tribe's beneficial ownership of all lands – including submerged lands – within the 1873 reservation; it also shows Congress's recognition of the uncertainty of

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[14] The events surrounding the authorization clearly show that the main purpose of the new negotiations was to regain from the Tribe whatever submerged lands it was willing to sell. The State itself notes that "as the district court recognized, the 1889 . . . Act was an authorization 'to negotiate with the Tribe of a release of the submerged lands' " (quoting district court decision). Relevant events include the 1888 resolution; the response to that resolution; the events leading up to the resolution, such as the pressure, brought to Congress's attention, to open up the Lake; the negotiations themselves, which focused heavily on boundaries as they affected submerged lands; and a subsequent report from the Department of the Interior, which noted that little agricultural land had been acquired. *See* Message from the President, S. Ex. Doc. No. 14, at 2.

regaining any land at all, and its particular desire to recover whatever submerged lands it could.

In short, Congress "otherwise made very plain," *Holt State Bank*, 270 U.S. at 55, its intention regarding the submerged lands. With the 1887 agreement and the response to the 1888 resolution before it, Congress, fully aware of the boundaries of the 1873 reservation and the extent of the submerged lands that were within it, sought to modify the boundaries described in the agreement – and it sought to do so via purchase rather than the simpler expedient of rejecting the executive reservation. Although Congress may have been unhappy to learn that the executive reservation included submerged lands, its actions show recognition and acceptance of the passage of beneficial ownership to the Tribe, for it sought to *regain* as much submerged land as possible. The affirmative course of action on which Congress embarked in 1889 – open-ended negotiations to purchase whatever non-agricultural land, particularly submerged lands, the Tribe was willing to cede – presupposes that beneficial ownership of all land within the 1873 reservation, including submerged lands, had already passed to the Tribe.

To the extent that the State argues that reversal is necessary because the district court erred in relying on the disclaimer clause in the Idaho constitution,[15] we reject this challenge. We do not read the district court's brief

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[15] This clause, found in article XXI, § 19, of the Idaho constitution, reads: ". . . . And the people of Idaho do agree and declare that we forever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indians or Indian tribes[.]"

discussion of this clause as integral to its ruling. Nor, for that matter, do we believe reliance on the clause is necessary to affirm the judgment quieting title to submerged lands within the present-day reservation. To the extent the clause is considered at all, however, it weighs in favor of the conclusion we have reached, for it disclaims title to land "held by" Indians. The lands in question were held by the Tribe, and Congress affirmed this provision when it ratified the Idaho constitution.[16]

We also note that although Congress has never undertaken by general laws to dispose of submerged lands, this case involves much more than a simple disclaimer clause or a general reference in the Idaho Admission Bill to accepting, ratifying, or confirming the Idaho constitution. Congress was heavily involved in deciding the fate of the submerged lands set aside for the Tribe's

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[16] That such a disclaimer clause may be declaratory, conferring no new right or power on the United States, is immaterial. The substance of a declaratory clause is not meaningless, even if the clause itself is unnecessary in that it merely recognizes a preexisting interest. *See United States v. Gardner*, 107 F.3d 1314, 1320 (9th Cir. 1997) (finding constitutional clause disclaiming title to unappropriated public lands and explaining that although the U.S. "did not need the disclaimer clause to gain title to the public lands in Nevada," such a declaratory clause of a preexisting U.S. right to administer its property is valid).

We also reject as inapplicable to this case the State's argument that Congress cannot require states to disclaim rights of sovereignty as the price of admission to the Union. Congress did not do so here. All Congress did was to acknowledge and ratify, through its course of conduct, the executive reservation of certain submerged lands for the benefit of the Tribe.

benefit by executive order. Congress treated the submerged lands as beneficially owned by the Tribe – to the point of authorizing negotiations for cession of whatever portion of the Tribe's submerged lands it was willing to sell. The State's citation to *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), is not instructive. There a provision in the Alaska constitution disclaiming all right and title to property that "may be held" by or in trust for natives stood alone, with no prior or specific congressional action referencing the submerged lands at issue, *see id.* at 1405-06; in addition, the executive conveyance in *Ahtna* did not occur until well after Alaska's statehood. *See id.* at 1403.

Finally, we note that in addition to the series of congressional actions prior to Idaho's statehood, Congress's post-statehood actions also reflect recognition and confirmation that submerged lands had passed to the Tribe prior to Idaho's statehood. Although these post-statehood events are not in themselves demonstrative of pre-statehood intent, nor are they central to our decision, neither can they be wholly ignored.[17]

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[17] Although the State suggests that post-statehood events may not be considered in assessing congressional intent, we are aware of no rule forbidding consideration of such events. Indeed, the case law may suggest the contrary. *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89-90 (1918) (finding support for conclusion that Congress intended to include submerged lands within reservation in subsequent conduct whereby reservation was treated as including submerged lands). *Cf. Aam*, 887 F.2d at 194 (district court did not abuse its discretion in finding that matters occurring after Washington's admission in 1889 were too remote to be probative of the intent of the parties to an 1855 treaty or of the Secretary's intent upon

Among these events, the most notable is the 1894 Harrison cession, which was ratified just five years after the 1889 authorization to negotiate. The United States negotiated with the Tribe for the cession of a narrow strip of land extending from the Lake to the eastern boundary of the reservation. During the negotiations, the parties referred to the 1889 agreement as having created a boundary line in relation to the Lake, and they explicitly included a corner of the Lake in the cession. A cession that included a portion of the lake bed would not have been necessary absent a contemporary understanding that the Tribe had beneficial ownership of the bed. Moreover, as was the case with the 1889 agreement, the map submitted to Congress depicted the cession as including part of the bed, literally creating a right angle in the water. This post-statehood acknowledgment of tribal ownership of the lake bed is further confirmation, or reaffirmation, of the status of the submerged lands within the reservation. It is tantamount to a memorialization of prior events, especially given that nothing occurred between statehood and the negotiations for the Harrison cession that altered the ownership situation. Just as Congress would not have negotiated with the Tribe for land the Tribe did not own, so too the United States, on behalf of the Tribe, would not have ceded to the State land that the State already owned.

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enlargement of the reservation in 1864). Notably, *Aam* does not set forth any general rule barring post-statehood evidence, and it is also readily distinguishable, for the substantial time gap – 40 years – motivating the *Aam* decision is not present here.

The same can be said for the course of events leading to the creation of the Park. In 1908, Congress withdrew from allotment, for use as a park, a portion of the reservation embracing three smaller lakes adjacent to the southern end of the Lake, and in 1911 it formally transferred this area to the State. There would have been no need for the United States to withdraw the lands comprising the Park from the reservation and no need for the United States to convey these lands by patent to the State if the State already owned them. We thus have another significant example of the contemporary understanding of all parties concerned with regard to the Tribe's beneficial ownership of submerged lands within its reservation.

II. The Tribe's Cross-Appeal – Heyburn State Park

The cross-appeal raises the question of whether the district court erred in refusing to decide ownership of submerged lands within the Park. We must decide whether the parties' pleadings[18] – specifically, the United States' complaint and the State's counterclaim – put at issue submerged lands within the Park. Resolution of this question requires a careful and commonsense reading of the pleadings. We reject the cross-appeal because the

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[18] In construing the parties' pleadings, we bear in mind that the current physical situation in and around the Park differs from the situation that existed in 1873, at the time of the executive reservation, and in 1908 and 1911, the years, respectively, that the Park was authorized and conveyed to the State. Due to the construction of a dam, three small lakes have combined with the Lake into one large body of water. We read the United States' complaint in light of the physical situation as it existed prior to the construction of the dam.

complaint, read as a whole, does not include lands within the Park and the United States disavowed any intent to quiet title to submerged lands within the Park. Further, the relief the State seeks in its counterclaim largely mimics the United States' prayer for relief, and the State has likewise disclaimed any intent to litigate issues beyond those raised in the United States' complaint. Accordingly, we conclude that the district court properly declined to adjudicate the ownership of these submerged lands.

Neither the complaint nor the counterclaim put submerged lands within the Park at issue. The complaint, taken as a whole, is most naturally read to exclude these lands. First, it specifically identifies the lands that comprise the Park as having been "withdr[awn] from allotment" and "reserved" by the United States. It then juxtaposes these lands, along with other lands that the Tribe ceded to the United States, with lands identified as "still remaining within the Coeur d'Alene 1873 Reservation." The implication is that the United States sought to exclude any lands within the Park from the ambit of the complaint. In addition, the complaint's prayer for relief repeatedly makes reference to the "approximate southern one-third of Coeur d'Alene Lake as well as those portions of the beds and banks of the St. Joe River located within the 1873 Coeur d'Alene Indian Reservation." That the complaint references a specific part of the Lake and the St. Joe River while mentioning none of the three lakes that were the subject of the conveyance to the State strongly suggests that the United States sought to exclude the Park from this quiet title action.

Our reading of the complaint is supported by the conduct of the United States throughout this litigation. Significantly, the United States has pursued this action, both in the district court and on appeal, only as to submerged lands within the present-day boundaries of the reservation. Indeed, at the district court level, the United States expressly disavowed any claim to submerged lands within the Park. Under these circumstances, we will not read the more general language in the complaint's caption and preliminary statement, which refer to portions of the Lake and St. Joe River within the exterior boundaries of the 1873 reservation, as extending to submerged lands within the Park.

We also reject the Tribe's argument that the State itself put submerged lands within the Park at issue via a counterclaim in which it asserted that it was "entitled to a judgment . . . quieting its title to the beds and banks of those portions of Lake Coeur d'Alene and the St. Joe River located within Heyburn State Park."[19] Although the counterclaim incorporates the allegations in an affirmative defense claiming title to "all lands within" the Park, the State's prayer for relief largely mimics the United States' prayer, which is far narrower than the affirmative defense. In its prayer for relief, the State seeks to quiet title to "those portions of Lake Coeur d'Alene and the St. Joe River within the present boundaries of the Coeur

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[19] The State's answer included two sections referencing the Park: 1) an affirmative defense in which the State claimed title to "all lands within Heyburn State Park as a result of . . . federal actions" authorizing the Park and conveying its lands to the State by patent; and 2) the above-quoted counterclaim. Only the counterclaim is at issue.

d'Alene Reservation and Heyburn State Park." Notably, and in contrast to its affirmative defense, the State does not name in its prayer for relief any of the three lakes originally embraced by the Park, and it has consistently disclaimed any attempt to litigate any issue beyond that raised in the United States' complaint.

Because the United States disavowed any claim to submerged lands within the Park, the State disavowed intent to litigate any issue beyond that raised by the United States, and a fair reading of the relief requested in both the complaint and counterclaim does not, under the circumstances, encompass lands within the Park, the district court properly declined to adjudicate the ownership of submerged lands within the Park.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

In re suit to quiet title to that portion of the bed and banks of the Coeur D'Alene Lake and St. Joe River lying within the exterior boundaries of the-1873 Coeur D'Alene Reservation	
UNITED STATES OF AMERICA, Plaintiff-Counterdefendant, and COEUR D'ALENE TRIBE, Plaintiff in Intervention Counterdefendant in Intervention, vs. STATE OF IDAHO, Defendant.	Case No. CV 94-328-N-EJL **MEMORANDUM DECISION AND ORDER** (Jul. 28, 1998)

I. Introduction

This case involves a dispute over the ownership of the bed and banks of Coeur d'Alene Lake and the St. Joe River (the "submerged lands") lying within the exterior boundaries of the present-day Coeur d'Alene Indian Reservation. The United States of America acting in its own capacity and as trustee for the Coeur d'Alene Tribe of Idaho (the "Tribe") initiated the current action against the

State of Idaho seeking to quiet title to the submerged lands for the benefit of the Tribe and its members. In addition to its title claim, the United States prays for a declaratory judgment to establish the Tribe's exclusive use, occupancy and right to the quiet enjoyment of the submerged lands. Finally, the United States seeks a permanent injunction prohibiting the State from asserting any right, title or other interest to such lands.

By leave of the Court, the Tribe intervened to assert independently its beneficial interest in the submerged lands based on the theory of "recognized title" and, alternatively, to claim ownership to the same lands pursuant to unextinguished "aboriginal or Indian title." The State answered and counterclaimed, requesting that the title of the submerged lands be quieted in favor of Idaho. The matter was then tried before the Court without a jury. The Court's decision is set forth below and constitutes its findings of fact and conclusions of law.

II. Historical Background

The Tribe once inhabited more than 3.5 million acres in what is now northern Idaho and northeastern Washington. On June 14, 1867, President Andrew Johnson established by Executive Order a reservation for the Tribe. The 1867 reservation consisted for the most part of an area known as Hangman Valley,[1] lying to the southwest of Coeur d'Alene Lake (the "Lake"). The parties

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[1] The area known as Hangman Valley also is referred to in various exhibits as Hangman Creek Valley or Latah Valley or Paradise Valley or Palouse Valley.

dispute whether the 1867 reservation included any portion of the submerged lands within its exterior boundaries but, at most, the reservation embraced only a small sliver of the Lake. The precise boundaries of the 1867 reservation never were established by survey, and the Tribe never formally accepted the reservation as its own.

On July 1, 1873, the Commissioner of Indian Affairs directed a three member Commission to visit non-treaty tribes in Idaho, including the Coeur d'Alenes, for the purpose of inducing the tribes "to abandon their roaming habits and consent to confine themselves within the limits of such reservation or reservations as may be designated for their occupancy." Ex. 309 at 1; Ex. 234 at 17, 385. As the result of negotiations between the Commission and the Tribe, an agreement was reached which entitled the Tribe to a reservation of approximately 598,000 acres and compensation for the relinquishment of all claims to the remainder of its aboriginal lands.

The reservation boundaries established by the 1873 agreement embraced the Hangman Valley, the Coeur d'Alene River (from its mouth to the Coeur d'Alene Mission of the Sacred Heart[2]), the St. Joe River (from its mouth to the present site of St. Maries), and all but a small portion of the Lake. As such, the 1873 reservation included within its boundaries not only the area set aside by the 1867 Executive Order but also the Lake and other waterways as well as additional tracts of land. The 1873

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[2] The Coeur d'Alene Mission of the Sacred Heart is popularly known today as the Cataldo Mission. Historically, it also has been called the Sacred Heart Mission or the Old Coeur d'Alene Mission.

agreement, however, required approval by Congress before it became binding on the parties.

In a letter dated November 4, 1873, the Commissioner of Indian Affairs advised the Secretary of Interior of the 1873 agreement and recommended that "pending the action of Congress upon said agreement . . . the President . . . issue an Executive Order setting apart the same for the use of said Indians." Ex. 3240. On November 8, 1873, President Ulysses S. Grant established by Executive Order a reservation for the Tribe that mirrored exactly the legal boundaries delineated in the 1873 agreement:

> It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians in said Territory, viz:
>
> Beginning at a point on the top of the dividing ridge between Pine and Latah (Hangmans) Creeks, directly south of a point on said last-named creek 6 miles above the point where the trail from Lewiston to Spokane Bridge crosses said creek; thence in a northeasterly direction in a direct line to the Coeur d'Alene Mission on the Coeur d'Alene River (but not to include the lands of said mission); thence in a westerly direction in a direct line to the point where the Spokane River heads in or leaves the Coeur d'Alene Lakes; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington as established by the act of Congress organizing a Territorial government for the Territory of Idaho; thence south along said

> dividing line to the top of the dividing ridge between Pine and Latah (or Hangmans) Creeks; thence along the top of said ridge to the place of beginning.

Ex. 275 at 72. Although a purpose of the Executive Order was to temporarily set aside the reservation "pending the action of Congress," the 1873 agreement never was ratified by Congress.

The United States conducted a survey of the reservation in 1883. Once the boundaries had been established, Congress sought to extinguish the Tribe's aboriginal title to lands outside the reservation. In 1886, Congress authorized the Secretary of the Interior to negotiate with the Tribe "for the cession of their lands outside the limits of the present Coeur d'Alene reservation." Ex. 649. In 1887, the Tribe and representatives of the United States reached an agreement in which the Tribe ceded

> all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

Ex. 215 at 68. The 1887 agreement provided that it "shall not be binding on either party until ratified by Congress." *Id.* at 69.

Before it had ratified the 1887 agreement, Congress authorized the Secretary of the Interior "to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." Ex. 2288 at 1002. The

resulting negotiations lead [sic] to an agreement in 1889, in which the Tribe ceded the approximate northern third of the 1873 reservation to the United States. The portion of the reservation subject to the 1889 cession included within its boundaries the approximate northern two-thirds of the Lake. The 1889 agreement provided that it was "not binding on either party until ratified by Congress." Ex. 215 at 14.

Prior to congressional ratification of the 1887 and 1889 agreements, Idaho was admitted into the Union. As part of that process, Congress enacted the Idaho Statehood Act, which "accepted, ratified, and confirmed" the Idaho State Constitution. Ex. 221 at 215. The state constitution contains a section disclaiming the State's "right and title to the unappropriated public lands" and lands "owned or held by any Indians or Indian tribes." Ex. 2294 at 415. Shortly after Idaho secured statehood, Congress, on March 3, 1891, ratified the 1887 and 1889 agreements.

With two exceptions, the boundaries of the Coeur d'Alene Reservation remain the same today as established by the congressional ratification of the 1887 and 1889 agreements. In 1894, the Tribe agreed to cede to the United States a one-mile wide strip of the reservation, running from the mouth of the Coeur d'Alene River to the reservation's eastern boundary (the "Harrison cession"). And in 1908, Congress authorized the conveyance to the State of Idaho of land surrounding three small lakes, adjacent to the southern extreme of the Lake. Following its transfer by patent to the State of Idaho in 1911, this area became a public park ("Heyburn State Park").

III. Legal Framework

The United States and the Tribe (collectively, "the Plaintiffs") allege that the Executive Order of 1873 setting apart the reservation also reserved for the benefit of the Tribe the bed and banks of the Lake and other navigable waterways lying within the outer boundaries of the reservation. According to the Plaintiffs, Congress intended to retain, for the benefit of the Tribe, title to the submerged lands included within the reservation created by the 1887 and 1889 agreements.[3] In contrast, the State maintains that under the "equal footing" doctrine title to all submerged lands within the exterior boundaries of the 1873 reservation passed to the State of Idaho on July 3, 1890, when Idaho was admitted into the Union.

The United States Supreme Court recently articulated the legal principles relevant to resolving a dispute over the ownership of submerged lands. In *United States v. Alaska*, 117 S. Ct. 1888 (1997), the Supreme Court emphasized the critical connection between the ownership of submerged lands and a State's sovereignty: "Ownership of submerged lands – which carries with it the power to control navigation, fishing, and other public uses of water – is an essential attribute of sovereignty." *Id.* at 1892; *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2041-42 (1997). For this reason, and in order to maintain an "equal footing" with the original 13 colonies, a State is presumed upon admission to the Union to "succeed to

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[3] The United States' claims are specifically limited to the submerged lands included within the exterior boundaries of the present-day Coeur d'Alene Reservation. The Court by prior order denied the Tribe's request to broaden the quiet title action.

the United States' title to the beds of navigable waters within [its] boundaries." *Alaska*, 117 S. Ct. at 1892. Accordingly, " '[a] court deciding a question of title to the bed of navigable water must . . . begin with a strong presumption' against defeat of a State's title." *Id.* at 1906 (quoting *Montana v. United States*, 450 U.S. 544, 552 (1981)).

Under the Constitution, however, the Federal Government can defeat a future State's title to land underlying navigable waters. The Property Clause, Art. IV, § 3, cl. 2, provides Congress with the power to dispose of submerged lands in pre-statehood territories by "granting submerged lands to private parties" or by reserving "submerged lands under federal control." *Id.* The congressional exercise of this power will not offend the Constitution so long as the conveyance or reservation is for "an appropriate public purpose." *Id.* at 1909. In this case, there is no doubt that the United States' alleged retention of the submerged lands for the benefit of the Tribe would serve an appropriate public purpose. *See id.* at 1907. The issue instead is whether the Federal Government in fact acted to reserve the disputed submerged lands.

In this regard, the question of "[w]hether title to submerged lands rests with a State . . . is ultimately a matter of federal intent." *Id.* In the least difficult case, the Federal Government's intent to defeat the future State's title is made clear by "an express reference to the bed beneath the waters . . . in the grants establishing the reservation." *United States v. Aranson*, 696 F.2d 654, 664 (9th Cir.) (citing *Montana*, 450 U.S. at 552), *cert. denied*, 464 U.S. 982 (1983). When the pertinent documents do not

make express reference to the bed and banks, a conveyance or reservation may be implied but a court "will not infer an intent to defeat a future State's title to inland submerged lands 'unless the intention was definitely declared or otherwise made very plain.' " *Alaska*, 117 S. Ct. at 1906 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)). Thus, the intent of the Federal Government to retain submerged lands may be demonstrated by an express statement or may be inferred from relevant evidence.

In a case such as this one, where it is alleged that the submerged lands were included within an Executive reservation, the inquiry as to federal intent involves three distinct questions. First, whether the actions of the Executive reflected a clear intent to include submerged lands within the reservation. *See id.* at 1907-09. Second, whether Congress authorized the Executive retention of the submerged lands or ratified the same. *See id.* at 1910-11. Third, and finally, whether Congress intended to defeat the future State's title to those lands. *See id.* at 1909-10. Evidence that bears directly on the resolution of these three questions includes (1) the language of the relevant documents, (2) the location of the reservation boundaries in relation to the submerged lands, and (3) the purpose of the reservation. *See, e.g., id.* at 1908. In contrast, evidence consisting solely of "the 'mere fact that the bed of a navigable water lies within the boundaries' " of a reservation will not overcome the presumption against defeat of a State's title. *Id.* at 1907 (quoting *Montana*, 450 U.S. at 554).

Special evidentiary considerations apply when it is alleged that an Executive reservation implements an

agreement between the United States and a tribe. Specifically, Ninth Circuit cases have formulated a three-part test that bears on the first inquiry under *Alaska* as to whether the Executive intended to include submerged lands within the reservation. In an effort to give effect to the "principle of construction resolving any ambiguities in agreements with the United States in favor of the Indian tribes," Ninth Circuit decisions have allowed a plaintiff to establish federal intent on this issue by showing (1) the reservation included "within its boundaries a navigable water," (2) the tribe depended on the watercourse for a significant portion of the tribe's needs; and (3) the "Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the [reservation]."[4] *Muckleshoot Indian Tribe v. Trans-Canada Enter., Ltd.*, 713 F.2d 455, 457 (9th Cir. 1983) (quoting *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1258 (9th Cir.1983), *cert. denied*, 465 U.S. 1049 (1984)), *cert. denied*, 465 U.S. 1049 (1984); *see also United States v. Aam*, 887 F.2d 190, 194, 196-97 (9th Cir. 1989). *But see United States v. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d 1502, 1510-11 (9th Cir.) (holding that tribal dependence upon a river and the United States' awareness of dependence is not enough to establish federal intent to retain submerged lands for benefit of tribe), *cert. denied*, 502 U.S. 956 (1991).

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[4] The Ninth Circuit has noted more than once that by articulating the three-part test it did not "mean to imply that only where these conditions are met is a conclusion that the United States granted the bed of a navigable water to an Indian tribe justified." *Muckleshoot Indian Tribe*, 713 F.2d at 458 n.2.

Even if successful in satisfying the three-part test, and therefore demonstrating the Executive intent to reserve submerged lands, the plaintiff also must show that Congress authorized or ratified the Executive reservation and that Congress intended to defeat the future State's title to the submerged lands. *See Alaska*, 117 S. Ct. at 1909-11; *Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987). The necessity of establishing congressional awareness and approval of an Executive decision to reserve submerged lands rests on the relationship between the "equal footing" doctrine and the allocation of federal power under the Constitution. The power of the Federal Government to defeat a future State's equal footing title resides ultimately with Congress.[5] *See, e.g., Alaska*, 117 S. Ct. at 1906, 1910-11 (stating that pursuant to the Property Clause Congress can reserve submerged lands under federal control); *Utah Div. of State Lands*, 482 U.S. at 200-01 (explaining that the power to defeat a future State's title to submerged lands arises out of Congress' power under the Property Clause).

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[5] In the *Muckleshoot* and *Puyallup* cases the Ninth Circuit panels assumed that once the plaintiff demonstrated an Executive intent to include submerged lands within the reservation the ownership issue had been resolved. *See Muckleshoot Indian Tribe*, 713 F.2d at 457-458; *Puyallup Indian Tribe*, 717 F.2d at 1260-61 & n.10. Subsequent Supreme Court cases have shown this to be an erroneous assumption. *See, e.g., Alaska*, 117 S. Ct. at 1906, 1910-11; *Utah Div. of State Lands*, 482 U.S. at 200-02.

IV. Findings of Fact and Conclusion of Law

During a trial lasting nine days, the parties to this action presented evidence on the pertinent legal issues in the form of expert and lay testimony, written reports, scientific studies and historical documents. Having heard and/or reviewed all of the evidence, the Court sets forth its findings of fact and conclusions of law.

A. Executive Actions Reflect a Clear Intent to Include the Submerged Lands Within the 1873 Reservation.

Applying the three-part test developed by the Ninth Circuit in *Puyallup Indian Tribe*, 717 F.2d at 1258, to the trial evidence, the Court finds that the first question under *Alaska* – whether the Executive intended to reserve the submerged lands – must be answered in the affirmative.

1. The reservation includes within its boundaries land under navigable waters.

The parties agree that the disputed submerged lands lie within the exterior boundaries of the present-day Coeur d'Alene Reservation. Similarly, the State does not contest the fact that the Lake and associated waterways are navigable bodies of water. After considering the evidence presented at trial, the Court finds that the Lake and the relevant portions of the Coeur d'Alene, St. Joe and Spokane Rivers were at all times navigable watercourses and that the Coeur d'Alene Reservation includes within its boundaries the disputed submerged lands. Test. of

Hart, Tr. at 282-89; Test. of Fahey, Tr. at 1027-30, 1034; Ex. 209 at 47; Ex. 1319 at 1-4; Ex. 2310; Ex. 2313.

2. The Tribe depended on the Lake and associated waterways for a significant portion of the Tribe's needs.

The Coeur d'Alene Indians have occupied the area adjacent to the Lake and the Coeur d'Alene, St. Joe and Spokane Rivers since time immemorial. The Tribe traditionally survived by fishing, hunting and gathering. For the reasons set forth below, the Court finds the Lake and associated waterways were essential to the Tribe's traditional lifestyle.

Historically, the Coeur d'Alene Indians lived in a number of villages located around the Lake and along the rivers. The Tribe consumed resident trout and whitefish year-round.[6]

The resident fishery was a main staple of the Tribe's diet. Among other methods of fishing, the Coeur d'Alenes constructed fish traps and weirs which were anchored in the bed and banks of the watercourses. In some cases these structures were extensive, spanning the width of a river. Surplus fish were sometimes dried for

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[6] Spokane Falls, on the Spokane River, prevented salmon and other anadromous fish from migrating upstream into the Coeur d'Alene drainage system. However, a salmon run did reach upper Hangman Creek. Tribal members also sometimes harvested salmon outside the Tribe's aboriginal territory. But the total contribution to the Tribe's diet was minimal; it is estimated the Coeur d'Alenes obtained less than 5 percent of their total caloric intake from salmon. Ex. 1435 at 18.

later use or traded to other tribes. Occasionally, tribal members also harvested crayfish and freshwater mussels. Test. of Hart, Tr. at 43-73; Hart Report (Ex. 1437) at 5-28; Test. of Sprague, Tr. at 745-763, 765-69, 785; Sprague Report (Ex. 2404) at 31-33; Ex. 33 at 132-33, 148; Ex. 64 at 7; Ex. 115 at 38-41; Ex. 132 at 17-18; Ex. 133 at 37-38; Ex. 137 at 175-76; Ex. 139 at 10; Ex. 145 at 130-33; Ex. 171 at 38-40, 55, 88, 94-95, 105-07; Ex. 2030 at 104-16; Ex. 2272.

The Lake and associated rivers were commonly used to facilitate hunting activities. During communal hunts, deer were driven into a waterway and large numbers, sometimes hundreds, were killed by tribal members waiting in ambush. The Coeur d'Alenes also depended on the waterways to hunt small game, such as beaver, as well as migratory waterfowl. Test. of Hart, Tr. at 72-75; Hart Report (Ex. 1437) at 28-30; Test. of Sprague, Tr. at 769-75; Sprague Report (Ex. 2404) at 35-36; Ex. 105 at 27; Ex. 133 at 38-39; Ex. 171 at 101-03; Ex. 2271; Ex. 2271.

The Tribe gathered several plants growing in the marshes and wetlands of the Coeur d'Alene waterways. Most important among these was the water potato, a plant that was gathered annually by tribal members from the shallow waters of the Lake and rivers. The Coeur d'Alenes also collected rushes and tule from alongside the waterways for use in the construction of baskets, mats and the Tribe's lodges. Test. of Hart, Tr. at 80-81; Hart Report (Ex. 1437) at 33-36; Test. of Sprague, Tr. at 777, 790; Sprague Report (Ex. 2404) at 33-34.

The watercourses provided the primary highways for travel, trade and communication. Canoes were prevalent and constructed in several distinct styles. Travel was

measured in the days it took a canoe to get from point to point. Canoes also facilitated the Tribe's fishing and hunting activities. Test. of Hart, Tr. at 76-77; Hart Report (Ex. 1437) at 30-33; Test. of Sprague, Tr. at 780-85; Sprague Supplemental Report (Ex. 2405) at 3-6.

The Lake and rivers played an integral part in the Tribe's cultural activities. The waterways were tied to the Tribe's recreational pursuits, religious ceremonies and burial practices. In this respect, the Lake and rivers served not only as the means by which the Tribe ensured its corporeal survival, but also as the source of the Tribe's spiritual and cultural identity. Test. of Hart, Tr. at 81-87; Hart Report (Ex. 1437) at 34, 36-43; Test. of Sprague, Tr. at 786-89, 797-800; Sprague Report (Ex. 2404) at 48-50; Ex. 112 at 88-94.

The Tribe augmented its year-round dependence on the water resource by engaging in seasonal subsistence activities. In summer, the Coeur d'Alenes harvested camas, a plant yielding a fleshy bulb. Hangman Valley was the site of extensive camas fields and therefore an important area within the Tribe's aboriginal territory. Tribal members also harvested berries throughout the summer as they ripened at successive elevations. Test. of Sprague, Tr. at 776-78; Sprague Report (Ex. 2404) at 33; Ex. 133 at 21; Ex. 171 at 88-93

With the advent of the horse, some tribal member traveled to the Plains during the late fall to participate in an annual buffalo hunt. In this regard, the acquisition of the horse reduced somewhat the Tribe's reliance on fishing and small game hunting. Cox Report (Ex. 1437) at 11; Ex. 33 at 142-46; Ex. 171 at 151-52. However, the majority

of Coeur d'Alenes continued to live along the waterways and engage in a traditional subsistence lifestyle. The pastoral influence arising from the introduction of the horse and buffalo hunt most significantly affected the villages located near the Spokane (Rathdrum) Prairie, but even at these sites tribal members continued to depend on the water resource.[7] Test. of Hart, Tr. at 87-89; Test. of Sprague, Tr. at 779-80, 804-07; Test. of Cox, Tr. at 1537-40, 1574-75; Cox Report (Ex. 1437) at 12, 14-17, 27-28; Power Report (Ex. 2325) at 3-4; Ex. 26 at 10, 189-90; Ex. 33 at 145-46; Ex. 137 at 175-76; Ex. 232 at 710-11.

By the 1840's, the Coeur d'Alenes had begun to cultivate small garden plots, rarely exceeding an acre or two. The primary crops were potatoes and wheat. While the Tribe's agricultural endeavors augmented its traditional lifestyle, it did not supplant the Tribe's dependence on the waterways for a steady source of fish, fowl and plants. The limited quantities and seasonal availability of garden produce served at most as a supplement to the continuous and stable source of food and fibre provided by the water resource. Test. of Hart, Tr. at 145-46; Test. of Sprague, Tr. at 793, 833; Sprague Supplemental Report (Ex. 2405) at 3; Test. of Power, Tr. at 1489-92; Test. of Cox, Tr. at 1541-46, 1576-79; Cox Report (Ex. 1437) at 19-20, 23, 25; Ex. 101 at 158-61, 204; Ex. 2275 at 30; Ex. 2358 at 68, 73.

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[7] The State contends that following the acquisition of the horse many tribal members relocated from stream side villages to open, grassy areas, adopted pastoralism, and abandoned the Tribe's traditional subsistence lifestyle. The weight of the evidence demonstrates, however, that the majority of Coeur d'Alenes continued to live along the waterways and depend on the water resource for food, fibre and transportation.

To summarize, the majority of the Tribe's population lived in villages located next to the Lake and rivers. The Tribe's proximity to the watercourses was no coincidence; the Lake and rivers provided resources that were essential to the Coeur d'Alenes' survival. The Tribe depended on the waterways for a year-round source of fish, small mammals, waterfowl and plant materials. The Tribe also depended on the waterways to facilitate the harvest of large mammals and to serve as a means of efficient transportation. Finally, the Tribe's spiritual, religious and social life centered around the Lake and rivers.

The Court's findings are based in part on the expert testimony of Mr. Richard Hart, Dr. Roderick Sprague, Dr. Thomas Power and Dr. Thomas R. Cox.[8]

The opinions of these witnesses were well within their respective areas of expertise, supported by the documentary evidence and were not diminished on cross-examination. In addition, the Court's findings are supported by the various scientific studies and oral histories submitted by the parties. Archaeological, ethnographic and linguistic studies, as well as tribal traditions and histories, confirm that the Coeur d'Alenes located the majority of their villages along the Lake and rivers, and relied on the water resource to ensure their survival.

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[8] The State introduced the expert testimony and report (Ex. 3235) of Dr. Kent D. Richards to show that the Tribe was not dependent on the Lake and rivers. However, Dr. Richards' opinions on this issue were significantly undermined on cross-examination and, in any event, the great weight of the evidence is to the contrary.

Based on the above findings, the Court concludes that the Tribe depended on the Lake and associated rivers for a significant portion of its needs. *Cf. Aam*, 887 F.2d at 196-97. The waterways were essential to the Tribe's livelihood, providing a reliable year-round source of food and fibre. *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Puyallup Indian Tribe*, 717 F.2d at 1259; *cf. Skokomish Indian Tribe v. France*, 320 F.2d 205, 210-12 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964). Furthermore, the Coeur d'Alenes "depended on watercourses, not only for food and materials, but also in their manner of self-identification, language and religious practices." *Muckleshoot Indian Tribe*, 713 F.2d at 458.

3. At the time of the 1873 Executive reservation, the Federal Government was plainly aware of the vital importance of the submerged lands and the water resource to the Tribe.

At the time of the 1873 Executive reservation, the Federal Government was plainly aware of the Tribe's dependence on the Lake and rivers. As discussed in detail below, the evidence shows that in 1873 the majority of tribal members continued to rely on the water resource for a significant portion of their needs. Moreover, events immediately preceding and following the 1873 agreement demonstrate that government officials were made aware of the Tribe's reliance on the waterways. The fact that the boundaries of the reservation, as determined by the 1873 agreement and endorsed by the Executive Order, were drawn to include the Lake and rivers leads the Court to conclude that a purpose of the 1873 Executive reservation

was to retain the submerged lands for the benefit of the Tribe.

(a) The Tribe continued to be dependent on the water resource in 1873.

Non-Indian contact with the Tribe increased through the early and middle 1800's. Of particular importance to the Coeur d'Alenes was the arrival of Jesuit missionaries in 1842. During the next fifty years, the Jesuits exerted considerable influence over the Tribe's cultural development, often acting as advisors to the Tribe in its dealings with the Federal Government. In numerous and detailed recorded accounts, the Jesuit priests described the Tribe's traditional reliance on the Lake and rivers. Test. of Hart, Tr. at 92-110; Hart Report (Ex. 1437) at 52-68, 91-93; Test. of Sprague, Tr. at 747-48; Sprague Report (Ex. 2404) at 52-54.

In 1846, the Jesuits established the Mission of the Sacred Heart on the Coeur d'Alene River and with the help of tribal members began farming. Eventually, the Mission's farm totaled 200 acres. The agricultural production from the Mission farm, however, did not play a significant role in the Coeur d'Alenes' diet. Test. of Hart, Tr. at 164, 518-19, 1615-16; Hart Report (Ex. 1437) at 99; Test. of Sprague, Tr. at 804-06; Ex. 60 at 61-64; Ex. 1147 at 1-2; Ex. 2221 at 159; Ex. 2265 at 997; Ex. 2358 at 78-86. While many of the federal officials that interacted with the Coeur d'Alenes during the 1850's and early 1860's commented on the Tribe's agricultural efforts, they also noted the Tribe's use of the Lake and rivers. Hart Report (Ex. 1437) at 69-73, 87-91, 96-98; Ex. 100 at 84; Ex. 168 at

135, 147-48; Ex. 208 at 372; Ex. 2222 at 366-68; Ex. 2338 at 30, 42, 49; Ex. 2409; Ex. 3029 at 36-40; Ex. 3033.

After completion of the Mullan Road in 1862, the Mission experienced an influx of emigrants, miners and other travelers. This proved to be the beginning of a gradual invasion of the Tribe's aboriginal territory. In 1867, apprehension over the effect of the Tribe's aboriginal title on non-Indian ownership claims prompted the President to establish a reservation for the Coeur d'Alenes. The 1867 reservation consisted for the most part of the area known as Hangman Valley and included only a small sliver of the Lake. Test. of Hart, Tr. at 132-33, 146-61; Hart Report (Ex. 1437) at 94-101, 102-07; Ex. 118 at 24-25; Ex. 227 at 192; Ex. 228 at 417-18; Ex. 239.

Apparently unaware of the 1867 Executive reservation, the Tribe in November of 1871 sent a petition to the Commissioner of Indian Affairs requesting a "charter to possess 20 or 25 miles square of land exclusively for us." Ex. 3066. The petition describes the relevant tract of land as "[t]hat-basin on both sides of Hang-man-creek called: Paradise Valley." *Id.* This description corresponds to the area known as Hangman Valley.

In late 1871 or early 1872, the Coeur d'Alenes became aware of the 1867 reservation and expressed their dissatisfaction with its boundaries. Ex. 307; Ex. 234 at 392. On November 18, 1872, tribal leaders sent a second petition to the Commissioner of Indian Affairs stating in part as follows:

> In our first petition we made no mention of our church nor of the two valleys of S. Joseph

> and Coeur d'Alene rivers, because in our ignorance we thought it a matter of course. . . .
>
> As to the two valleys, we did not think to ask for them, though they have been from old the habitual residence of most of us; because being every spring under water, we thought no white man could ever settle there in fact there is none as yet: the few spots which usually escape being inundated, we have them fenced in and cultivated. What we are unanimous in asking, besides the 20 square miles already spoken of, are the two valleys, the S. Josephs, from the junction of S. and N. forks, and the Coeur d'Alene from the Mission inclusively. It would appear too much, and it would be so if all or most of it were fit for farming but the far greatest part of it is either rocky or too dry, too cold or swampy; besides we are not as yet quite up to living on farming: with the work of God we took labor too, we began tilling the ground and we like it: though perhaps slowly we are continually progressing; but our aided industry is not as yet up to the white man's. We think it hard to leave at once old habits to embrace new ones: for a while yet we need have some hunting and fishing.

Ex. 300.[9] The second petition makes three points relevant to the Court's present inquiry. First, the Tribe never entertained the possibility of withdrawing to a reservation that did not include the river valleys. Second, the Tribe considered the area adjacent to the waterways its home.

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[9] After considering all the evidence, the Court finds that the second petition was received by the Department of Interior on March 7, 1873. Ex. 2351; Test. of Richards, Tr. at 1427-33.

Third, and most important, in 1872 the Tribe continued to rely on the water resource for a significant portion of its needs. *Id.*

While the second petition makes clear the Tribe's continuous reliance on the Lake and rivers, other sources reporting on the Tribe's economic status during the late 1860's and early 1870's offer conflicting assessments. Several reports emphasize the Tribe's commitment to farming, Ex. 233 at 726; Ex. 303; Ex. 3239; Ex. 3245, while other accounts note the Tribe's continued reliance on fishing, Ex. 305; Ex. 232. Most important among the latter is a letter from David P. Thompson to the Commissioner of the General Land Office, dated May 6, 1873, urging that the 1867 reservation be enlarged to include the waterways because "[s]hould the fisheries be excluded there will in my opinion be trouble with these indians but should they be included and also the mission which should also be in the Reservation there will be no trouble."[10] Ex. 305. Also significant is the 1871 Agent report by W.P. Winas, observing that: "The Coeur d'Alenes reside on Spokane Prairie, and their number living in this Territory is about one hundred and fifty. They farm on a small scale, but subsist principally by hunting and fishing."[11] Ex. 232 at 711.

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[10] In his letter, Thompson states that his information comes from Rev. Father Cataldo, who he "knows . . . represents the views of the Indians." Ex. 305. Thompson's letter eventually was forwarded to the Commissioner of Indian Affairs. Ex. 306.

[11] Significantly, tribal members living on the Spokane Prairie were from that portion of the Tribe most willing to adopt an agrarian based lifestyle. *See, e.g.* Test. of Sprague, Tr. at 804-06; Test. of Cox, Tr. at 1537-40, 1574-75; Cox Report (Ex. 1437) at 12, 14-17, 27-28.

Having considered all the evidence, the Court finds that at the time of the Executive reservation in 1873 the Tribe continued to be dependent on the Lake and rivers. Reports describing the Tribe's agricultural successes are in conflict with other official assessments, are not necessarily based on personal knowledge, and may be tainted by cultural and personal bias. Depictions of agricultural activity most likely are based on the Tribe's maintenance of garden plots, horses and, in some cases, cattle. Estimates of farmed acreage and agricultural output demonstrate that in the early 1870's the Coeur d'Alenes were not engaged in systematic farming practices. Test of Hart, Tr. at 524-25, 539-43, 1609-15, 1620-23; Test. of Sprague, Tr. at 830-33; Test. of Power, Tr. at 1480-92, 1496-1500; Power Report (Ex. 2325) at 4-8; Test. of Cox, Tr. at 1556-57; Cox Report (Ex. 1437) at 25; Ex. 232 at 711; Ex. 2340; Ex. 3034.

In this regard the Court rejects the State's contention that the "Big Move" to the Hangman Valley area occurred in the late 1860's and early 1870's, and that by 1873 the Tribe had converted to an agrarian based society, no longer dependent on the Lake and rivers. All competent evidence shows that the Tribe's "Big Move" to Hangman Valley started sometime after 1873 and that the Tribe's sole reliance on systematic agricultural practices did not become a reality until much later. *E.g.*, Test of Hart, Tr. at 88-89, 1627-28; Ex. 60 at 61-69; Ex. 206 at 42, 44; Ex. 240 at 250; Ex. 243 at 212; 214; Ex. 245 at 205-06; Ex. 1147 at 1-21.

Other evidence indicates that in 1873 the Tribe continued to depend on the water resource for a significant portion of its needs. Ex. 305; Ex. 232 at 711. Most important, the second petition provides the Tribe's own assessment of its ability to live without the resources provided

by the Lake and rivers. In no uncertain terms, the Coeur d'Alenes made it be known that their continued reliance on the waterways was necessary to ensure their survival. Ex. 300.

Based on all the above, the Court concludes that in 1873 the Lake and rivers were an essential part of the "basket of resources" necessary to sustain the Tribe's livelihood. While tribal members also engaged in gardening, gathering and hunting, the waterways provided a reliable, year-round source of food, fibre and transportation without which the Tribe could not have survived. *Alaska Pacific Fisheries*, 248 U.S. at 89; *Puyallup Indian Tribe*, 717 F.2d at 1259; *Muckleshoot Indian Tribe*, 713 F.2d at 458; *cf. Aam*, 887 F.2d at 196-97; *Skokomish Indian Tribe*, 320 F.2d at 209.

(b) The Federal Government was plainly aware of the Tribe's dependence on the Lake and rivers at the time of the Executive reservation in 1873.

On July 1, 1873, the Commissioner of Indian Affairs directed a three member Commission to visit non-treaty tribes in Idaho, including the Coeur d'Alenes, for the purpose of inducing the tribes "to abandon their roaming habits and consent to confine themselves within the limits of such reservation or reservations as may be designated for their occupancy." Ex. 309 at 1; Ex. 234 at 17, 385. The Commission members included J.P.C. Shanks, Chairman of the House Committee on Indian Affairs, Thomas Bennett, Territorial Governor of Idaho, and John

Monteith, Agent to the Nez Perce Indians. The Commission arrived at the Lake on July 23, 1873, spent two days examining the boundaries of the proposed reservation, and met in council with the Tribe on July 25, 26 and 27. An agreement was signed on July 28, 1873. Ex. 315; Ex. 645.

The agreement called for setting aside a significantly larger portion of the Tribe's aboriginal territory than had been reserved by the 1867 Executive Order. Besides Hangman Valley, the boundaries of the proposed reservation enclosed all but a small portion of the Lake, the Coeur d'Alene River, from its mouth to the Sacred Heart Mission, the St. Joe River, from its mouth to the present-day site of St. Maries, and a tract of land lying to the south of the Spokane River. The precise boundaries of the expanded reservation were identified by reference to a legal description. Under the agreement, the eastern boundary of the reservation was to head north "in a direct line, to the Coeur d'Alene Mission, on the Coeur d'Alene river (but not to include the lands of said Mission)," with the northern boundary heading "thence in a Westerly direction, in a direct line, to the point where the Spokane River heads in or leaves the Coeur d'Alene lake; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho, and Washington." In addition to expanding the boundaries of the reservation to include the Lake and rivers, the agreement also guaranteed "that the water running into said reservation shall not be turned from their natural channel where they enter said reservation." In exchange for this enlarged reservation, and other compensation, the Tribe agreed to relinquish all claims to the

remainder of its aboriginal lands. The agreement provided that it was not binding on the parties until ratified by Congress. Ex. 645.

In a letter to the Commissioner of Indian Affairs, dated August 6, 1873, Agent Monteith listed four reasons for enlarging the boundaries of the 1867 reservation: first, an adjustment in the southwest boundary would include "several Indian farms" and exclude "four places belonging to white settlers;" second, running the eastern boundary north to the Mission "will leave some good farming land in the Upper Latah and will take in several farms around the new Mission on the Coeur d'Alene river;" third, "by running down the Spokane [the Tribe] can put the mills at the upper falls at much less expense than building a steam mill;" and fourth, "[b]y following the Washington and Idaho line to the dividing ridge between the Latah and Pine Creek it will include all Indian farms in Idaho and leave out all white settlements." Ex. 315. Although three of the four reasons for expanding the reservation focus on the location of agricultural lands, other than the specific areas identified by Monteith, the majority of the expanded reservation was not suitable for farming.[12] Ex. 300; Ex. 305; Ex. 2316(B).

In response to public criticism, Governor Bennett also sought to justify the Commission's decision to agree to an enlarged reservation. In a letter to the *Idaho Signal*, dated October 4, 1873, Governor Bennett stated: "We found that the Indians *demanded* an extension of their reservation so

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[12] Much of the land added by the 1873 agreement was later characterized by the Federal Government as not suitable for agriculture. Ex. 213 at 4, attach; Ex. 215 at 2, 4.

as to include the Catholic Mission and fishing and mill privileges on the Spokane River." Ex. 704 (emphasis in original).

On November 4, 1873, the Commissioner of Indian Affairs sent a letter to the Secretary of Interior that described the boundaries of the proposed reservation and then stated:

> In order that the tract thus described may be protected from trespass by white persons pending the action of Congress upon said agreement, I have the honor to recommend that the President be requested to issue an Executive Order setting apart the same for the use of said Indians.

Ex. 3240. Incorporating the legal description from the 1873 agreement, President Ulysses S. Grant, on November 8, 1873, "ordered that . . . the same is hereby withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians." Ex. 275 at 72.

In 1883, the Federal Government surveyed the boundaries of the 1873 reservation. Consistent with the description of the boundaries set forth in the 1873 agreement and adopted by the Executive Order, the instructions to the surveyor directed him to run the northern boundary across the Lake from the Sacred Heart Mission to the head of the Spokane River. By locating the northern boundary across the Lake, a portion of the Lake's north end was excluded from the reservation. Surveying a boundary across a navigable waterway was contrary to the usual practice of meandering a survey line along the mean high water mark. The 1883 survey fixed the reservation's total area at 598,499.85 acres, a calculation that

included submerged lands under the Lake and rivers within the boundaries of the reservation. Test. of Willett, Tr. at 887-99; Hart Report (Ex. 1437) at 354-62; Ex. 213; Ex. 699.

Based on the foregoing, the Court concludes that in 1873 the Federal Government was plainly aware of the Tribe's dependence on the Lake and rivers. As recounted above, from first contact with the Coeur d'Alenes, government officials noted the Tribe's reliance on the water resource. Any uncertainty concerning the extent of the Tribe's dependence on the Lake and rivers in 1873 was dispelled by the Tribe's request in the second petition for inclusion of the waterways in an expanded reservation. Most important, during the 1873 negotiations the Coeur d'Alenes reiterated their demand that the 1867 reservation be enlarged to include the Tribe's traditional fishing grounds. According to Governor Bennett, the expanded boundaries fixed by the 1873 agreement reflected the United States' realization that the Coeur d'Alenes required a reservation that included the Tribe's fishery. Thus, at the time of the 1873 reservation the "Government's Indian agents understood that 'the capture of fish was an essential source of the Indians' food supply.' "[13]

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[13] Contrary to the State's argument, the Plaintiffs are not required to show that the President, Secretary of Interior or Commissioner of Indian Affairs actually knew of the Tribe's dependence on the waterways. It is necessary only to show that the government's agents involved in the events giving rise to the reservation or grant of the submerged lands were plainly aware of the Tribe's dependence. *See Muckleshoot Indian Tribe*, 713 F.2d at 457-58; *Puyallup Indian Tribe*, 717 F.2d at 1259-61

Muckleshoot Indian Tribe, 713 F.2d at 458; *see also Puyallup Indian Tribe*, 717 F.2d at 1259-61.

The Plaintiffs have established each component of the three-part test developed by the Ninth Circuit in *Puyallup Indian Tribe*, 717 F.2d at 1258. The parties agree, and the Court finds, that the disputed submerged lands lie beneath navigable waters and within the exterior boundaries of the present-day Coeur d'Alene Reservation. The great weight of the evidence demonstrates that in 1873 the Tribe depended on the water resource for a significant portion of its needs. Finally, the evidence shows that the Federal Government was plainly aware of the Tribe's dependence at the time of the Executive reservation. *See Puyallup Indian Tribe*, 717 F.2d at 1259-61; *Muckleshoot Indian Tribe*, 713 F.2d at 456-58; *cf. Aam*, 887 F.2d at 196-97; *Aranson*, 696 F.2d at 666; *Skokomish Indian Tribe*, 320 F.2d at 210-12. By satisfying the *Puyallup* test, the Plaintiffs have successfully demonstrated that the Executive intended to reserve for the benefit of the Tribe the submerged lands within the 1873 reservation. *See Puyallup Indian Tribe*, 717 F.2d at 1258-61; *Muckleshoot Indian Tribe*, 713 F.2d at 457-58.

(c) Compelling evidence and/or a public exigency supports the conclusion that the Federal Government intended to include the submerged lands within the 1873 reservation.

At least one Ninth Circuit case holds that in addition to satisfying the *Puyallup* test a plaintiff must present

"compelling evidence" to show a "public exigency" justified the Federal Government's retention of submerged lands for the benefit of a tribe. *Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d at 1510-11. The United States Supreme Court, however, recently explained that a plaintiff has no such burden. In *Alaska*, the Supreme Court expressly rejected the notion that to succeed on a quiet title action a plaintiff must prove that a "public exigency" supported the reservation of submerged lands. 117 S. Ct. at 1909, 1915.

But even if controlling law required the Plaintiffs to show a "public exigency" existed at the time of the 1873 reservation, there is sufficient evidence to support a finding on this issue. Both the Supreme Court and the Ninth Circuit have held that a tribe's dependence on submerged lands constitutes a "public exigency." *E.g., Montana*, 450 U.S. at 556; *Aam*, 887 F.2d at 197-98; *Aranson*, 696 F.2d at 666; *Confederated Salish & Kootenai Tribes of Flathead Reservation, Mont. v. Namen*, 665 F.2d 951, 962 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982). Because the Plaintiffs in this case have shown that the Tribe's survival was dependent on the retention of the disputed submerged lands, they also have shown that a "public exigency" supported the Executive reservation of those same lands. *See, e.g., Alaska Pacific Fisheries*, 248 U.S. at 89; *Namen*, 665 F.2d at 962; *cf. Montana*, 450 U.S. at 556.

Furthermore, in this case the evidence is sufficient to establish the existence of other circumstances that also constitute a "public exigency." The facts demonstrate that an influx of non-Indians into the Tribe's aboriginal territory prompted the Federal Government to negotiate with the Coeur d'Alenes in an attempt to confine the Tribe to a

reservation and to obtain the Tribe's release of its aboriginal lands for settlement. Before it would agree to these conditions, however, the Tribe demanded an enlarged reservation that included the Lake and rivers. Thus, the Federal Government could only achieve its goals of promoting settlement, avoiding hostilities and extinguishing aboriginal title by agreeing to a reservation that included the submerged lands. Under similar circumstances, courts have found a "public exigency" sufficient to justify the Federal Government's decision to reserve the submerged lands. *See Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d at 1510-11; *Puyallup Indian Tribe*, 717 F.2d at 1258-61; *Muckleshoot Indian Tribe*, 713 F.2d at 457-58.

Separate and apart from the evidence supporting a "public exigency" and the three-part *Puyallup* test, there is "compelling evidence" demonstrating the Federal Government's intent to reserve the submerged lands for the benefit of the Tribe. *Cf. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d at 1510-11 (holding that evidence of tribal dependence upon a river and the United States' awareness of that dependence is insufficient to satisfy plaintiff's burden without additional "compelling evidence" of federal intent to retain submerged lands for benefit of tribe).[14] Under the analysis employed by the Supreme Court in

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[14] The panel's utilization of a "compelling evidence" standard in *Pend Oreille Pub. Util. Dist. No. 1* is an anomaly; no other Ninth Circuit decision and no Supreme Court opinion has ever employed a "compelling evidence" standard in a submerged land case.

Alaska, the language of the relevant documents, the location of the reservation boundaries in relation to the submerged lands and the purpose of the reservation are all highly relevant to ascertaining the intention of the Federal Government. *See, e.g.* 117 S. Ct. at 1908. In this case, evidence relating to each consideration shows that the actions of the Executive reflected a clear intent to include the submerged lands within the reservation.

The Supreme Court's submerged land cases "establish that the fact that navigable waters are within the boundaries of a conveyance or reservation does not in itself mean that submerged lands beneath those waters were conveyed or reserved." *Id.* On the other hand, where an Executive order setting aside a reservation does more than "merely define a boundary that encloses a body of navigable water," the description of the reservation's boundaries in relation to the submerged lands may signal an intent to retain federal ownership. *Id.* Here, the 1873 Executive Order uses the Coeur d'Alene River, Spokane River and Lake as reference points for describing the boundaries of the reservation. Moreover, the 1873 agreement guarantees "that the water running into said reservation shall not be turned from their natural channel where they enter said reservation." Ex. 645. Reference to these water features in the 1873 agreement and Executive Order suggests a federal intent to include submerged lands within the reservation. *See Alaska*, 117 S. Ct. at 1908, 1914; *Namen*, 665 F.2d at 962.

Even more important, the 1873 Executive Order expressly describes a northern boundary that runs across the waters of the Lake and down the center of the Spokane River. Fixing a boundary line across a navigable

body of water was contrary to the usual practice of meandering a boundary along the mean high water mark. *See Skokomish Indian Tribe*, 320 F.2d at 207. By defining the northern boundary in terms of the waterways, the Executive Order necessarily included within the reservation the lands beneath the Lake and Spokane River lying to the south of the boundary, and excluded from the reservation submerged lands lying to the north of the boundary. "It would have been pointless, and quite likely deceptive, to have the northern boundary of the reservation bisect [the] Lake unless it was intended to convey title to the southern [portion] of that lake to the Indians." *Namen*, 665 F.2d at 962.[15] Significantly, the official survey calculated the reservation's total area at 598,499.85 acres, a figure that included the submerged lands within the reservation boundaries. *Cf. Skokomish Indian Tribe*, 320 F.2d at 209 (stating that failure to include submerged lands in reservation's acreage computation indicates there was no intention to set aside those lands for tribal use). Thus, the clear intent to retain the submerged lands can be found in the 1873 Executive Order, which "by its 'terms embraces the land under the waters of the . . . [L]ake.' " *Pend Oreille*

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[15] In *Namen* the Ninth Circuit also noted that had the Federal Government "intended not to convey the southern half of the lake to the Indians, it could easily have defined the Reservation's northern boundary, upon reaching the west shore of the lake, as running along the shore of the southern half of [the] Lake." 665 F.2d at 962 n.28. The same can be said here: if the intent was to exclude submerged lands from the 1873 reservation, the Federal Government could have defined the northern boundary, upon reaching the Mission, as running along the shore of the southern part of the Lake to the head of the Spokane River. *See* Test. of Willett, Tr. at 899.

Pub. Util. Dist. No. 1, 926 F.2d at 1511 (quoting *Montana*, 450 U.S. at 552 and citing *Namen*, 665 F.2d at 962); *see also Alaska*, 117 S. Ct. at 1908, 1914.

Under *Alaska*, the purpose of the reservation also "is a critical factor in determining federal intent." 117 S. Ct. at 1908. Looking first to the Executive Order for any statement of purpose, it announces that the area described in the 1873 agreement is "withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians." Ex. 275 at 72. Focusing on the language of the Executive Order that withdraws the reserved land from sale and on language from an official report that explains the reservation had been set aside "in order that white persons may be prohibited from settling thereon," Ex. 234 at 392; Ex. 3240, the State argues that the Executive Order did not include submerged lands within the reservation because such lands are not subject to sale or settlement. The State reads the Executive Order too narrowly. Although the Executive Order did seek to preclude appropriation of lands within the reservation, it also had a much broader purpose: to create a reservation for the exclusive use of the Tribe "pending the action of Congress upon [the 1873] agreement." Ex. 3240; *see also* Ex. 275 at 72; Ex. 324 at 385. Because the reservation was not designed solely to prevent appropriation of lands, the Court must look to the purpose of the 1873 agreement to determine whether the reservation embraced submerged lands.

In 1873 the Federal Government sought an agreement with the Coeur d'Alenes in order to confine the Tribe to a reservation and extinguish the Tribe's aboriginal title. Ex. 228; Ex. 324 at 385, 392; Ex. 704. The Tribe had refused to

settle within the confines of the 1867 reservation. Ex. 307; Ex. 234 at 392. Thus, the Federal Government could only achieve its goals – to extinguish aboriginal title and free tribal lands for settlement – by agreeing to an expanded reservation. In this regard, the Coeur d'Alenes demanded an enlarged reservation that included the Tribe's fishing grounds, a mill site and the Mission. Ex. 300; Ex. 315; Ex. 704. The Tribe's demand for its fishing grounds and a mill site could not be satisfied without an agreement that included within the reservation the land under the Lake and rivers. That the Federal Government did in fact agree to reserve the submerged lands for the benefit of the Tribe is demonstrated by the following factors: 1) the United States was aware that the waterways were essential to the Tribe's livelihood; 2) the boundaries of the enlarged reservation were drawn to include the Lake and rivers; 3) the expanded reservation did not add significantly to the agricultural land base already reserved by the 1867 Executive Order; 4) the description of the reservation's boundaries by its terms embraced the submerged lands; and 5) a member of the Commission, Governor Bennet, acknowledged that the expansion of the reservation was for the purpose of meeting the Tribe's demand for its fishing grounds and a mill site. *Cf. Skokomish Indian Tribe*, 320 F.2d at 210 (denying tribal title to submerged lands after explaining "that the [Skokomish] reservation was intended only as a residence, and the Indians were to remain free to roam and fish at their usual places").[16]

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[16] In contrast to the intended purpose of the reservation created for the Indians in *Skokomish Indian Tribe*, here a reason for expanding the reservation to include the Tribe's fishery was precisely so that tribal members could be confined within its

This evidence leads the Court to conclude that a purpose of the 1873 agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource. Because an object of the 1873 Executive Order was, in part, to create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement, a purpose of the Executive Order was to reserve the submerged lands under federal control for the benefit of the Tribe. *See, e.g., Puyallup Indian Tribe*, 717 F.2d at 1260-61.

In sum, the intent of the Federal Government to include submerged within the 1873 reservation can be garnered from numerous sources. The evidence supports a finding in favor of the Plaintiffs on each element of the three-part *Puyallup* test. There also is sufficient evidence to demonstrate a "public exigency" existed at the time of the 1873 reservation. In addition, the terms and purpose of the 1873 agreement and Executive Order provide "compelling evidence" of a federal intent to reserve the submerged lands. The Court therefore concludes that the actions of the Executive reflected a clear intent to retain for the benefit of the Tribe the submerged lands within the 1873 reservation.

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boundaries. Indeed, Commission member Governor Bennet had earlier stated his belief that to avoid conflicts with whites an Indian reservation *must* include the areas relied upon by a tribe for hunting and fishing. *Eg.* Ex. 1346.

B. Congress Ratified the 1873 Executive Reservation of Submerged Lands and Demonstrated a Clear Intent to Defeat Idaho's Title.

Although a purpose of the Executive Order was to set apart a reservation for the Coeur d'Alene Indians "pending the action of Congress," the 1873 agreement never was ratified by Congress. Nevertheless, the Executive Order effectively conveyed to the Tribe a beneficial interest in the reservation's lands. *Puyallup Indian Tribe*, 717 F.2d at 1261 n.10. Until Congress approved the Executive reservation, however, the Tribe's property right was "subject to termination at the will of either the executive or Congress." *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 331 (1942). Similarly, without congressional approval of the Executive retention of submerged lands, the Tribe's beneficial ownership of those lands could not defeat the future State of Idaho's equal footing title. *Alaska*, 117 S. Ct. at 1910-11, 1915-17. Because the Plaintiffs do not contend that prior to 1873 Congress had authorized the Executive reservation of submerged lands, it is necessary to review events subsequent to the Executive Order of 1873 to determine whether Congress ratified the inclusion of the submerged lands within the reservation and demonstrated a clear intent to defeat the State's title to those lands. *See id.*

1. Prior to Idaho's statehood, Congress was on notice that the Executive had reserved submerged lands for the benefit of the Tribe and Congress ratified the Executive retention of those lands, demonstrating a clear intent to defeat the future State of Idaho's equal footing title.

In an effort to secure permanent status for the 1873 reservation and obtain compensation for the loss of tribal lands to miners, settlers and other emigrants, the Tribe on March 23, 1885, submitted a petition to the Federal Government requesting that a Commission visit the Coeur d'Alenes to "make with us a proper treaty of peace and friendship . . . by which your Petitioners may be properly and fully compensated for such portion of their lands not now reserved to them; [and] that their present reserve may be confirmed to them." Ex. 206 at 42. In response, Congress authorized the Secretary of the Interior to negotiate with the Tribe "for the cession of their lands outside the limits of the present Coeur d'Alene reservation." Ex. 649. On March 26, 1887, the Tribe and representatives of the United States reached an agreement in which the Tribe ceded

> all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

Ex. 215 at 68. In exchange, the Federal Government promised "that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes of the Coeur d'Alene

Indians." *Id.* The 1887 agreement provided that it "shall not be binding on either party until ratified by Congress." *Id.* at 69.

During this same time period, non-Indians continued to encroach on tribal lands and increasingly make use of the Lake and rivers. Beginning in 1880, steamboats operated on the Lake, delivering miners and supplies to a landing near the Old Coeur d'Alene Mission. Because government officials considered the Lake and rivers lying within the outer boundaries of the 1873 reservation to be "Indian country," the transportation or distribution of liquor on board the steamboats constituted a violation of the Intercourse laws.[17] Ex. 362; Ex. 364; Ex. 366; Ex. 370; Ex. 411; Ex. 2256; Ex. 3148; Ex. 3152. In one instance, the Acting Inspector General noted that "with the exceptions of a few indentations on its northern coast, the entire lake of Coeur d'Alene . . . lay wholly within the Coeur d'Alene Indian Reservation," and then went on to recommend that a steamboat be seized when he observed "an open bar was kept on the boat, at which drinks or various sorts of liquor, were very freely and frequently sold."[18] Ex. 426.

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[17] The Trade and Intercourse Act of 1834 "specifically penalized both the introduction of liquor into Indian country and the operation of a distillery therein." *Rice v. Rehner*, 463 U.S. 713, 722 n.8 (1983).

[18] The Secretary of War informed the Secretary of the Interior of the Acting Inspector General's recommendation and apparently the matter was discussed at a Cabinet meeting held on August 10, 1886. Ex. 418; Ex. 427. The day after the Cabinet meeting the Secretary of the Interior referred to the Commissioner of Indian Affairs, for immediate report and recommendation, this "violation of law relating to the sale of liquor on Indian reservations." Ex. 428.

In a similar manner, government officials treated non-Indians engaged in recreational use of the Lake and rivers as trespassers. Those trespassers found fishing within the boundaries of the reservation were ejected. In one report, a government official noted he had "removed from the Coeur d'Alene Lake & its tributary waters one hundred and fourteen (114) persons [who] were engaged in Camping & Fishing." Ex. 429; *see also* Ex. 2261.

Trespass on both the uplands and waterways of the reservation became so serious it was brought to the attention of Colonel Carlin, the commanding officer of Fort Sherman. Ex. 463; Ex. 465; Ex. 467; Ex. 468. Colonel Carlin, however, resisted employing his troops to remove the trespassers. He first suggested that the northern boundary of the reservation had not been properly surveyed, Ex. 470; Ex. 474; Ex. 2261, and argued for an adjustment in the reservation boundaries because "it must be apparent to the government that some provision must be made by which the white people can enjoy at least a portion of the lake there and its waters for pleasure as well as business," Ex. 2261. Finally, in a letter addressed to the Commissioner of Indian Affairs, dated December 19, 1887, Colonel Carlin recommended "that by executive and congressional action combined the lines [of the reservation] be changed" to locate the northern boundary line in the center of the Coeur d'Alene River, from the Mission to the river's mouth, and in the middle of the Lake, from the mouth of the Coeur d'Alene River to the head of the Spokane River. Ex. 480; Ex. 2333(map). Colonel Carlin explained that the new boundaries he proposed "would throw open to the public a part of the Lake for purposes of navigation and pleasure [and] would also throw open

to the public the tract of land lying between Coeur d'Alene River and the Lake which is known to be valuable for its minerals but nearly worthless for agriculture." Ex. 480.

In an apparent effort to clarify the status of the Lake and rivers, the Senate, on January 25, 1888, passed a resolution which repeated the allegations made by Colonel Carlin and others,[19] and requested a response from the Secretary of Interior:

> Whereas it is alleged that the present area of the Coeur d'Alene Indian reservation, in the Territory of Idaho, embraces 480,000 acres of land . . . [and] that Lake Coeur d'Alene, all the navigable waters of Coeur d'Alene River, and about 20 miles of the navigable part of St. Joseph River, and part of St. Mary's, a navigable tributary of the Saint Joseph, are embraced within this reservation, except a shore-line of about 3 1/2 miles at the north end of the lake . . . that all boats now entering such waters are subject to the laws governing Indian country and all persons going on such lake or waters within the reservation lines are trespassers; and
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> Whereas it is further alleged that the Indians now on such reservation are located in the extreme southwest corner of the same . . . and it being further alleged that all part of such reservation lying between Lake Coeur

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[19] In a petition to Congress, dated February 1, 1887, the Idaho Territorial Legislature asked that the northeast portion of the 1873 reservation be restored to the public domain and noted that "a navigable river [the Coeur d'Alene River] traverses said portion of the reservation from east to west." Ex. 3154 at 53.

> d'Alene and Coeur d'Alene River and that part between the Coeur d'Alene River and St. Joseph River is a territory rich in the precious metals and at the same time being of no real use or benefit to the Indians: Therefore,
>
> *Resolved*, That the Secretary of the Interior be, and he is hereby directed to inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation . . . whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene and of Coeur d'Alene and St. Joseph Rivers . . . also whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under mineral laws of the United States, and if so, precisely what portion; and also whether it is advisable to release any of the navigable waters aforesaid from the limit of such reservation.

Ex. 187 at 693.

Responding on behalf of the Secretary of the Interior, the Commissioner of Indian Affairs, on February 7, 1988, reported to the Senate that "the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation which runs 'in a direct line' from the Coeur d'Alene Mission to the head of Spokane River." Ex. 213 at 3. After describing the "proportion of the reservation" suitable for agriculture, grazing and mining, the Commissioner reiterated the question posed by the Senate resolution: whether it would be "advisable to throw any portion of the said reservation open to the occupation and settlement . . . and, if so, precisely what

portion, and whether it is desirable to release any of the navigable waters." *Id.* at 3-4. Based on his opinion "that the reservation might be materially diminished without detriment to the Indians," the Commissioner recommended "that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of great benefit to the public." *Id.* at 6. Although the Commissioner was "unable to say . . . [j]ust what portion of the reservation and navigable waters should be segregated from the reservation," he thought it could "be determined by negotiations with the Indians." *Id.* The Commissioner concluded his report by opining that after ratification of the 1887 agreement "it will be an easy matter to negotiate with [the Tribe] for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms." *Id.* The Commissioner attached to his report a map of the 1873 reservation which depicted the Lake and rivers in relation to the reservation's boundaries and which displayed the total area of the reservation as 598,499.85 acres.

It was against this backdrop that Congress in 1888 debated the merits of the 1887 agreement. A 1890 House Report explained that the Fiftieth Congress (1888 session) decided against ratifying the 1887 agreement

> for sundry reasons, among which was a desire on the part of the United States to acquire an additional area, to wit, a certain valuable portion of the reservation specially dedicated to the exclusive use of said Indians under an Executive order of 1873, and which portions of said lands, situate on the northern end of said reservation, is valuable and necessary to the citizens of the

> United States for sundry reasons. It contains numerous, extensive, and valuable mineral ledges. It contains large bodies of valuable timber. . . . It contains a magnificent sheet of water, the Coeur d'Alene Lake, and its chief tributary, to wit, the Coeur d'Alene River. . . .

Ex. 206 at 4.

While withholding its approval of the 1887 agreement, Congress took steps "to acquire . . . the northern end of [the 1873] reservation." *Id.* On March 2, 1989, Congress passed the annual Indian Appropriations Act, which included a provision that authorized the Secretary of the Interior "to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." Ex. 2288 at 1002.

In August and September of 1889, a three member Commission met with tribal leaders and negotiated for the release of the reservation's northern end. The minutes of the negotiations reveal that the location of the new boundaries in relation to the Lake and rivers was a matter of concern to both the Tribe and United States. Known for their sagacity, and aware of the Federal Government's tendency to disregard its commitments to the Indian tribes, the Coeur d'Alenes insisted on defining the terms of any new agreement with precision.[20] At one point

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[20] The Tribe's hard bargaining practices inspired French trappers to call tribal members "Coeur d'Alenes," which translates directly to "Heart of an Awl," but was commonly interpreted as meaning "Pointed Hearts." The name symbolized

during the negotiations, General Simpson, the government's chief spokesman, told tribal leader Chief Seltice that "the Lake belongs to you as well as to the whites – to all, every one who wants to travel on it." Ex. 215 at 9. Seltice replied: "That is your idea about the boundary. You know we do not understand papers; in taking it that way we will not know the boundaries." *Id.* General Simpson then offered the United States' proposal for a diminished reservation and prefaced his description of its boundaries by stating: "You all know where the St. Joseph River is. We do not want any of that." *Id.* The government's proposal called for a new northern boundary that ran east from the Idaho/Washington territorial line to the west shore of the Lake, meandered the lake shore south to a point directly opposite the mouth of the Coeur d'Alene River, and "thence due east across said lake." *Id.* Thus, the boundary line was drawn so as to bisect the Lake, with the northern two-thirds of Lake excluded from the reservation and the southern one-third of the Lake included within the new reservation boundaries. *See id.* at 14, attach.(map). General Simpson explained to the Tribe that under the government's proposal "if we buy this land [the northern end of the 1873 reservation] you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River." *Id.* at 9. With some modification, this proposal became the basis of an

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the trappers' perception that tribal members negotiated with a "hard heart." Hart Report (Ex. 1437) at 48-49.

agreement signed on September 9, 1889.[21] The agreement provided that it was "not binding on either party until ratified by Congress." *Id.* at 14.

In a 1889/90 Report of the Secretary of the Interior to the House of Representatives, the 1889 agreement is described as an agreement "whereby the Indians agreed to sell a considerable portion of their reservation (in the northern part), valuable chiefly for minerals and timber, and embracing by far the greater portion of the navigable waters of the reservation." Ex. 250 at 22; *see also* Ex. 206 at 4.

Prior to congressional approval of the 1887 and 1889 agreements, Idaho became a state. As part of that process, Congress passed the Idaho Statehood Act, which admitted Idaho "into the Union on an equal footing with the original States in all respects whatever; and . . . accepted, ratified, and confirmed" the Idaho State Constitution. Ex. 221 at 215. The state constitution contains a section disclaiming

> all right and title to the unappropriated public lands lying within the boundaries [of Idaho], and to all lands lying within [Idaho] owned or held by any Indians or Indian tribes; and until

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[21] Under the government's original proposal, the new boundary line, after crossing the Lake, was to meander "southerly along the east shore of said lake to a point 1 mile north of the St. Joseph River," and then head east to the eastern boundary. Ex. 215 at 9. Under the final agreement, the new boundary line ran "to a point due west of the mouth of the Coeur d'Alene River, where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary of the said reservation." *Id.* at 3, 13, 14, attach.(map).

> the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.

Ex. 2294. Shortly after Idaho secured statehood, Congress, on March 3, 1891, ratified the 1887 and 1889 agreements. Ex. 3255.

Taken together, these events establish that Congress ratified the Executive reservation of the submerged lands and demonstrated the clear intent to defeat the future State of Idaho's title to those lands. The evidence shows that prior to Idaho's statehood, Congress was on notice that the Executive Order of 1873 reserved for the benefit of the Tribe the submerged lands within the boundaries of the Coeur d'Alene Reservation. The Senate pointedly asked the Secretary of Interior to confirm whether the Tribe retained control over the "navigable waters of Lake Coeur d'Alene and of Coeur d'Alene and St. Joseph Rivers." Ex. 187 at 693. The Commissioner of Indian Affairs, responding in detail, answered in the affirmative.[22] It is difficult to imagine a set of circumstances that could with any greater certainty place before Congress the fact that the 1873 reservation included the land beneath the Lake and rivers.[23] *Cf. Alaska*, 117 S. Ct. at

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[22] The House of Representatives also was on notice that the Executive reservation included the submerged lands. Ex. 206 at 4; Ex. 250 at 21-22.

[23] The actions by the Federal Government during the years following the 1873 agreement and Executive Order, which in all respects treat the submerged lands within the reservation as

1916-17 (finding Congress was on notice that an application reflected the Secretary of Interior's intent to reserve submerged lands where the action of making the application had been publicly announced, formal notice of the application had been published in the Federal Register and the Secretary had submitted a map to Congress showing the application area embraced submerged lands).

With this knowledge, Congress validated the Executive reservation of the submerged lands by enacting appropriation statutes that authorized government representatives to negotiate with the Coeur d'Alenes for a cession of tribal property. Ex. 99 at 272-73; Ex. 649; Ex. 2288. Most important, after the Commissioner of Indian Affairs had in no uncertain terms informed Congress that the Executive reservation included the submerged lands, Congress enacted a provision which authorized the Secretary of the Interior "to acquire . . . the northern end of said reservation." Ex. 206 at 4. By authorizing the Federal Government to negotiate with the Tribe for a release of the submerged lands, Congress acknowledged that the Executive Order of 1873 had effectively conveyed beneficial ownership of those lands to the Coeur d'Alenes. Accordingly, the Court concludes that Congress recognized and then ratified the Executive reservation of the

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belonging to the Coeur d'Alenes, confirm the Executive intent in 1873 to retain those lands for the benefit of the Tribe. *Alaska Pacific Fisheries*, 248 U.S. at 89-90 (finding support for conclusion that the Federal Government intended to reserve submerged lands for benefit of Indians in subsequent conduct that treated the reservation as including submerged lands).

submerged lands for the benefit of the Tribe.[24] *See, e.g., Alaska*, 117 S. Ct. at 1911, 1915-17 (holding that once Congress is on notice that the Executive intended to

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[24] The United State [sic] contends that despite the explicit language contained in both the 1887 and 1889 agreements, stating that they shall not be "binding on either party until ratified by Congress," each agreement became effective on the date signed. The Court need not decide this issue. The date that either agreement became effective is relevant to determining when, if ever, the Tribe ceded its title to certain lands. But because this case is limited to resolving ownership claims of submerged lands that never were ceded, the Court must only decide whether Congress ratified the Executive reservation of those lands prior to Idaho's statehood. As discussed above, the Court concludes that Congress ratified the inclusion of the submerged lands before Idaho became a state.

In the alternative, the United States asserts that the General Allotment Act of 1887 (the "Dawes Act") constituted congressional recognition of all Executive order reservations. Unfortunately for the government, the United States Supreme Court already has rejected this argument. *Sioux Tribe of Indians*, 316 U.S. at 330 (holding that the Dawes Act "did not amount to a recognition of tribal ownership"). It is noteworthy, however, that in 1890 the Commissioner of Indian Affairs also believed that the Dawes Act constituted a blanket recognition of all Executive reservations. He specifically related the purported effect of the Dawes Act to the status of the Coeur d'Alene Reservation: "The permanency of this tenure is further shown by the act of Congress authorizing and directing the Secretary of the Interior to negotiate with the Coeur d'Alene tribe of Indians in Idaho for the purchase and release of a portion of their reservation which was established by executive order. . . . " Ex. 1313. This is one more indication that Congress could have authorized the Secretary to negotiate with the Tribe for the release of the Lake and rivers only if at the same time Congress recognized the Tribe's beneficial ownership of the submerged lands.

reserve submerged lands, subsequent action by Congress that recognizes federal retention of those lands constitutes a ratification of the Executive action, and citing *Holden v. Joy*, 17 Wall. 211, 247 (1872) ("rejecting Property Clause challenge to President's treaty with Cherokee Nation; although terms of treaty exceeded express delegation of authority by Congress to the President, Congress had 'repeatedly recognized' the validity of the treaty by enacting appropriation statutes")); *see also Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 494-96 (1937).

By explicitly recognizing, prior to Idaho's statehood, an Executive reservation that included submerged lands, Congress demonstrated the clear intent to defeat the State's equal footing title. *See Alaska*, 117 S. Ct. at 1910-11 (explaining that Congress has demonstrated the clear intent to defeat a state's equal footing title if prior to statehood Congress recognizes an executive reservation of submerged lands for a purpose that requires federal ownership). Retention of the submerged lands was necessary to achieve the United States' objective, *id* at 1910, and Congress clearly contemplated continued federal ownership of those lands, *id.* at 1917. The 1889 agreement by its terms anticipates that the Tribe will remain the beneficial owner of the southern third of the Lake. The northern boundary line of the diminished reservation was drawn so as to bisect the Lake, and the minutes of the 1889 negotiations confirm that the placement of the boundary line was for the purpose of establishing the Tribe's rights to the Lake and rivers. This is "compelling evidence" that the United States intended for the Tribe to hold a beneficial interest in the submerged lands under

the southern third of the Lake. *See, e.g., Namen*, 665 F.2d at 962 & n.28. Congress could not have carried into effect the terms of the 1889 agreement without retaining title to the submerged lands. Congress clearly demonstrated its intent to reserve the submerged lands under federal control by ratifying the Executive inclusion of the submerged land within the 1873 reservation.[25] *See Alaska*, 117 S. Ct. at 1910-11, 1915-17.

In the Idaho Statehood Act, Congress made explicit the intent to defeat Idaho's title to the submerged lands.

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[25] The issue at this point of the analysis is not, as the State seems to imply, whether the Federal Government intended to include submerged lands within the 1873 reservation or whether a "public exigency" supported such an inclusion; those questions were asked and answered in relation to the point in time that the Executive acted to create the reservation. *See, e.g., Alaska*, 117 S. Ct. at 1908-09, 1914-15. Instead the inquiry must now focus on whether Congress realized that in 1873 the President "construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands" for the benefit of the Tribe and, if so, whether Congress ratified the Executive action and demonstrated the clear intent to defeat the State's title to those lands. *Id.* at 1911. As a practical matter, and as is true here, the congressional approval of an Executive reservation of submerged lands for a purpose that is inimical to State ownership often will also amount to a demonstration of Congress' intent to defeat the State's equal footing title. *See id.* at 1911-12, 1915-17; *cf. Utah Div. of State Lands*, 482 U.S. at 198-207 (explaining that where Congress has delegated to the Executive the power to reserve lands and there is no unambiguous evidence that members of Congress understood subsequent Executive reservations included submerged lands and purpose of reservation did not require federal ownership, plaintiff must show Congress "affirmatively intended to defeat the future State's title to such land").

In that statute, Congress admitted Idaho into the Union "on an equal footing with the original states," subject to the disclaimer clause of the Idaho State Constitution, which renounced the State's "right and title to the unappropriated public lands" and lands "owned or held by any Indians or Indian tribes." Ex. 2294. In this respect, the Idaho Statehood Act "operated to confirm [Idaho's] title to equal footing lands . . . unless the United States clearly withheld submerged lands . . . prior to statehood." *Alaska*, 117 S. Ct. at 1917; *see also United States v. Gardner*, 107 F.3d 1314, 1319-20 (9th Cir. 1996) (explaining that disclaimer clause is a recognition of preexisting United States title), *cert. denied*, 118 S. Ct. 264 (1997); *cf. Aam*, 887 F.2d at 198 (concluding that submerged lands were not "held" by tribe within meaning of disclaimer clause because tribe had not shown Federal Government reserved submerged lands for benefit of tribe). As explained above, the Executive Order of 1873 reflected a clear intent to reserve the submerged lands for the benefit of the Tribe and prior to Idaho's statehood Congress ratified the reservation of those lands. Thus, at the time Idaho secured statehood, the United States had clearly retained title to the submerged lands and conveyed a beneficial interest to the Tribe, thereby withholding, pursuant to the Idaho Statehood Act, the transfer of those lands to the State. *See Alaska*, 117 S. Ct. at 1916-17; *cf. Utah Div. of State Lands*, 482 U.S. at 202, 208.

2. The Plaintiffs have overcome the strong presumption of State ownership by demonstrating that the Federal Government intended to include the submerged lands within the Coeur d'Alene Reservation and that Congress intended to defeat the State's title to those lands.

In sum, the Court concludes that the United States retained, for the benefit of the Tribe, the submerged lands within the exterior boundaries of the present-day Coeur d'Alene Reservation.[26] Application of the three-part *Puyallup* test to the trial evidence demonstrates that the Federal Government clearly intended to include the submerged lands within the 1873 reservation. The evidence also shows a "public exigency" supported the Executive reservation of the submerged lands for the benefit of the Tribe. In addition, the terms and purpose of the 1873 agreement and Executive Order provide "compelling evidence" of a federal intent to reserve the submerged lands. The response of the Commissioner of Indian Affairs to the Senate resolution put Congress on notice that submerged lands had been included in the 1873 reservation. The fact that Congress directed the Secretary of the Interior to negotiate with the Tribe for a release of the submerged lands reflected Congress' intent to ratify the inclusion of submerged lands within the reservation and to defeat the State's title to those lands. In the Idaho

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[26] The Court's decision is expressly limited to a determination of the ownership of the submerged lands lying within the present-day boundaries of the Coeur d'Alene Reservation.

Statehood Act, Congress confirmed that the Federal Government retained title to the submerged lands for the benefit of the Tribe.[27]

C. Subsequent Events Substantiate That the Title to the Submerged Lands Did Not Pass to Idaho at Statehood.

Events subsequent to Idaho's admission into the Union support the conclusion that title to the submerged lands did not pass to Idaho at statehood. *See Alaska Pacific Fisheries*, 248 U.S. at 89-90 (finding support for conclusion that the Federal Government intended to reserve submerged lands for benefit of Indians in subsequent conduct that treated the reservation as including submerged lands). In 1893 and 1894, the Federal Government and the Tribe engaged in negotiations for the relinquishment of an area adjacent to the mouth of the Coeur d'Alene River. During the negotiations, the parties frequently referred to the fact that the 1889 agreement created a boundary line in relation to the Lake and mouth of the Coeur d'Alene River. *See* Hart Report (Ex. 1437) at 246-67; Ex. 207; Ex. 604. In a final agreement, the Tribe agreed to cede to the United States a one-mile strip of land, running from the mouth of the Coeur d'Alene River to the reservation's eastern boundary (the "Harrison cession"). Ex. 207.

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[27] In light of the Court's conclusion, it need not decide whether the doctrine of aboriginal title applies to submerged lands and, if so, whether the Tribe's aboriginal title to the submerged lands remains unextinguished.

The boundaries of the Harrison cession clearly reflect the Tribe's beneficial ownership of land underlying the Lake. The mile wide western boundary line is located in the Lake; the southern boundary begins at a right angle to the western boundary and runs east for more than a mile across the Lake. Ex. 140; Ex. 2334. A cession that included the lake bed would not have been necessary if title to the submerged lands had passed to Idaho at statehood.

V. ORDER

Based on the foregoing, and the Court being otherwise fully advised in the premises, **IT IS HEREBY ORDERED** that:

1. Title is quieted in favor of the United States, as trustee, and the Coeur d'Alene Tribe of Idaho, as the beneficially interested party of the trusteeship, to the bed and banks of the Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d'Alene Indian Reservation;

2. The United States, as trustee, and the Coeur d'Alene Tribe of Idaho, as the beneficially interested party of the trusteeship, are entitled to the exclusive use, occupancy and right to the quiet enjoyment of the bed and banks of the Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d'Alene Indian Reservation; and

3. The State of Idaho is permanently enjoined from asserting any right, title or otherwise interest in or to the bed and banks of the Coeur d'Alene Lake and the St. Joe

River lying within the current boundaries of the Coeur d'Alene Indian Reservation.

IT IS FURTHER ORDERED that the State of Idaho's counterclaim is **DENIED**.

IT IS FURTHER ORDERED that within fourteen (14) days of the date of this Order, the Plaintiffs shall submit a proposed judgment and decree.

DATED this 28th of July, 1998.

/s/ Edward J. Lodge
EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

March 3, 1891
26 Stat. 1027
1 Kappler 419

AGREEMENT WITH COEUR D'ALENE.

This agreement made pursuant to an item in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-seven, and for other purposes," approved May fifteenth, eighteen hundred and eighty-six, by John V. Wright, Jared W. Daniels, and Henry W. Andrews, duly appointed commissioners on the part of the United States and the Coeur d'Alene tribe of Indians now residing on the Coeur d'Alene Reservation, in the Territory of Idaho, by their chiefs, headmen, and other male adults, whose names are hereunto subscribed, they being duly authorized to act in the premises, witnesseth:

ARTICLE 1.

Whereas said Coeur d'Alene Indians were formerly possessed of a large and valuable tract of land lying in the Territories of Washington, Idaho, and Montana, and whereas said Indians have never ceded the same to the United States, but the same, with the exception of the present Coeur d'Alene Reservation, is held by the United States and settlers and owners deriving title from the United States, and whereas said Indians have received no compensation for said land from the United States: Therefore,

ARTICLE 2.

For the consideration hereinafter stated the said Coeur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

ARTICLE 3.

The said Coeur d'Alene Indians agree and consent that the Upper and Middle bands of Spokane Indians residing in and around Spokane Falls in the Territory of Washington, may be removed to the Coeur d'Alene Reservation and settled thereon in permanent homes on the terms and conditions contained in an agreement made and entered into by and between John V. Wright, Jared W. Daniels, and Henry W. Andrews, commissioners on the part of the United States and said Spokane Indians, concluded on the fifteenth day of March, eighteen hundred and eighty-seven, at Spokane Falls, in the Territory of Washington.

ARTICLE 4.

And it is further agreed that the tribe or band of Indians known as the Calespels, now residing in the Calespel Valley, Washington Territory, and any other bands of non-reservation Indians now belonging to the Colville Indian Agency, may be removed to the Coeur

d'Alene Reservation by the United States, on such terms as may be mutually agreed on by the United States and any such tribes or bands.

ARTICLE 5.

In consideration of the foregoing cession and agreements, it is agreed that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation, and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity: and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.

ARTICLE 6.

And it is further agreed that the United States will expend for the benefit of said Coeur d'Alene Indians the sum of one hundred and fifty thousand dollars, to be expended under the direction of the Secretary of the Interior, as follows: For the first year, thirty thousand dollars, and for each succeeding year for fifteen years, eight thousand dollars. As soon as possible after the ratification of this agreement by Congress, there shall be erected on said reservation a saw and grist mill, to be operated by steam, and an engineer and miller employed, the expenses of building said mill and paying the engineer and miller to be paid out of the funds herein provided. The remaining portion of said thirty thousand dollars, if any, and the other annual payments shall be

expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians, parties hereto.

ARTICLE 7.

It is further agreed that if it shall appear to the satisfaction of the Secretary of the Interior that in any year in which payments are to be made as herein provided said Coeur d'Alene Indians are supplied with such useful and necessary articles and do not need the same, and that they will judiciously use the money, then said payment shall be made to them in cash.

ARTICLE 8.

It is further agreed that any money which shall not be used in the purchase of such necessary articles or paid over, as provided in article seven, shall be placed in the Treasury of the United States to the credit of the said Coeur d'Alene Indians, parties hereto, and expended for their benefit, or paid over to them, as provided in the foregoing articles.

ARTICLE 9.

It is further agreed that in the purchase for distribution of said articles for the benefit of said Indians the wishes of said Indians shall be consulted as to what useful articles they may need, or whether they need any at all, and their wishes shall govern as far as it is just and proper.

ARTICLE 10.

It is further agreed that in the employment of engineers, millers, mechanics, and laborers of every kind, preference shall be given in all cases to Indians, parties hereto, qualified to perform the work and labor, and it shall be the duty of all millers, engineers, and mechanics to teach all Indians placed under their charge their trades and vocations.

ARTICLE 11.

It is further agreed that in addition to the amount heretofore provided for the benefit of said Coeur d'Alene Indians the United States, at its own expense, will furnish and employ for the benefit of said Indians on said reservation a competent physician, medicines, a blacksmith, and carpenter.

ARTICLE 12.

In order to protect the morals and property of the Indians, parties hereto, no female of the Coeur d'Alene tribe shall be allowed to marry any white man unless, before said marriage is solemnized, said white man shall give such evidence of his character for morality and industry as shall satisfy the agent in charge, the minister in charge, and the chief of the tribe that he is a fit person to reside among the Indians; and it is further agreed that Stephen E. Liberty, Joseph Peavy, Patrick Nixon, and Julien Boutelier, white men who have married Indian women and with their families reside on the Coeur d'Alene Reservation, are permitted to remain thereon,

they being subject, however, to all laws, rules, and regulations of the Commissioner of Indian Affairs applicable to Indian reservations.

ARTICLE 13.

It is further agreed and understood that in consideration of the amount expended in buildings and other improvements on said Coeur d'Alene Reservation for religious and educational purposes by the De Smet Mission, and valuable services in the education and moral training of children on said reservation, and in consideration that the Indians, parties hereto, have donated for said purposes one section of land on which is situated the boys' school, one section on which is situated the girl's school, and one section of timbered land for use of the schools, that said De Smet Mission and its successors may continue to hold and use said three sections of land and the buildings and improvements thereon so long as the same shall be used by said De Smet Mission and its successors for religious and educational purposes.

ARTICLE 14.

This agreement shall not be binding on either party until ratified by Congress.

In testimony whereof the said John V. Wright, Jared W. Daniels, and Henry W. Andrews, on the part of the United States, and the chiefs, headmen, and other adult Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

Done at De Smet Mission on the Coeur d'Alene Reservation, in the Territory of Idaho, on this the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

SEC. 20. That the following agreement entered into with the said Coeur d'Alene Indians by Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, Commissioners on the part of the United States, signed by said Commissioners and by said Andrew Seltice, Chief, and others, on the part of said Indians, which agreement bears date September ninth, eighteen hundred and eighty-nine, and is now on file in the Interior Department, is hereby accepted, ratified, and confirmed, and is in the following words, to wit:

AGREEMENT.

This agreement, made pursuant to an item of an Act of Congress, namely; Section 4 of the Indian appropriation act, approved March two, eighteen hundred and eighty-nine, (25 Stat., 1002), by Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, duly appointed commissioners on the part of the United States, parties of the first part, and the Coeur d'Alene tribe of Indians, now residing on the Coeur d'Alene Reservation in the Territory of Idaho, by their chiefs, headmen, and other male adults whose names are hereunto subscribed, parties of the second part witnesseth:

ARTICLE 1.

For the consideration hereinafter named the said Coeur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States, all the right, title, and claim which they now have, or ever had, to the following-described portion of their reservation, to wit: Beginning at the northeast corner of the said reservation, thence running along the north boundary line north sixty-seven degrees twenty-nine minutes west to the head of the Spokane River; thence down the Spokane River to the northwest boundary corner of the said reservation; thence south along the Washington Territory line twelve miles; thence due east to the west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary line of the said reservation; thence northerly along the said east boundary line to the place of beginning.

ARTICLE 2.

And it is further agreed, in consideration of the above, that the United States will pay to the said Coeur d'Alene tribe of Indians the sum of five hundred thousand dollars, the same to be paid to the said Coeur d'Alene tribe of Indians upon the completion of all the provisions of this agreement.

ARTICLE 3.

It is further agreed that the payment of money aforesaid shall be made to the said tribe of Indians pro rata or share and share alike for each and every member of the said tribe as recognized by said tribe now living on said reservation.

ARTICLE 4.

It is further agreed and understood that this agreement shall not be binding on either party until the former agreement now existing between the United States by the duly-appointed commissioners and the said Coeur d'Alene tribe of Indians, bearing date March twenty-sixth, eighteen hundred and eighty-seven, shall be duly ratified by Congress; and in the event of the ratification of the aforesaid agreement of March twenty-sixth, eighteen hundred and eighty-seven, then this agreement to be and remain in full force and effect but not binding on either party until ratified by Congress. In witness whereof the said Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, on the part of the United States, and the chiefs, headmen, and other adult male Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

Done at De Smet Mission, on the Coeur d'Alene Reservation, in the Territory of Idaho, this the 9th day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

SEC. 21. That for the purpose of carrying into effect the provisions of said two agreements with said Coeur

d'Alene Indians there are hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, in the manner and for the purpose as hereinafter specifically stated the following sums, to wit: For the first installment of one hundred and fifty thousand dollars, as provided for in article six of the first of said agreements, thirty thousand dollars, to be expended for the building and erection on said Coeur d'Alene Indian Reservation of a saw and grist mill, to be operated by steam, and for the payment of the wages of the engineer and miller to be employed in said mill, respectively, the remaining portion of said thirty thousand dollars, if any, to be expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians, all of said articles to be purchased, and said engineer and miller to be employed as near as may be in strict conformity with articles nine and ten of the first of said agreements. And for the purpose of meeting the requirements of articles two and three of the second agreement aforesaid the sum of five hundred thousand dollars is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid by the United States to the said Coeur d'Alene tribe of Indians upon their compliance with all the provisions of the said second agreement hereinbefore recited, the same to be paid to the said tribe of Indians pro rata, or share and share alike, for each and every member of the said tribe as recognized by said tribe now living on said reservation.

SECTION 22. That all lands so sold and released to the United States, as recited or described in both of said agreements, and not heretofore granted or reserved from

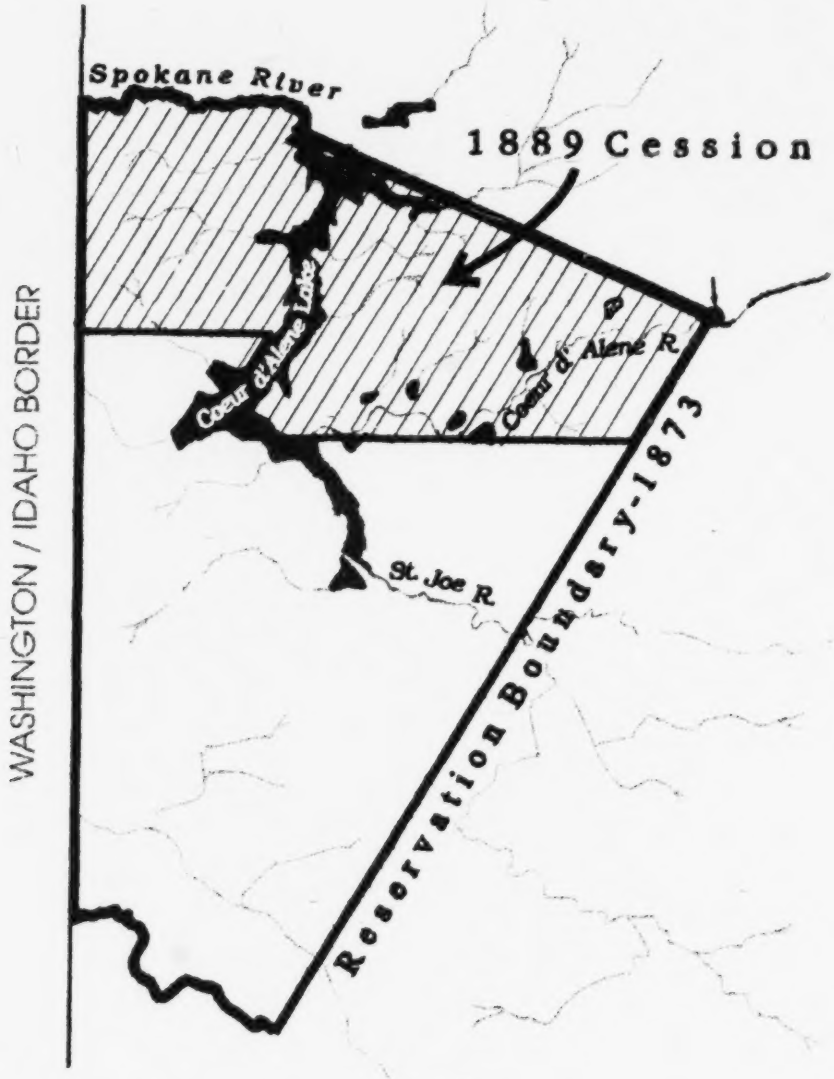
entry or location, shall, on the passage of this act, be restored to the public domain, and shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law, except section twenty-three hundred and one of the Revised Statutes of the United States, which shall not apply, and under the law relative to town sites or to locators or purchasers under the mineral laws of the United States: *Provided*, That each settler or purchaser under and in accordance with the provisions of said homestead act, shall pay to the United States, for the land so taken by him, in addition to the fees provided by law, and within five years from the date of the first original entry, the sum of one dollar and fifty cents per acre, one-half of which shall be paid within two years; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States shall not be abridged, except as to the said sum to be paid as aforesaid: *Provided further*, That the Secretary of the Interior shall cause to be surveyed for and patented to Frederick Post, upon his making final proof of all thereof before the register and receiver of the proper United States land office, and to the satisfaction of the Commissioner of the General Land Office and Secretary of the Interior, and paying therefor two dollars and fifty cents per acre and the cost of making such survey of such portion of said reservation as is recited in the agreement in word and figures as follows, to wit:

"Know all men by these presents that I, Andrew Seltice chief of the Coeur d'Alene Indians, did on the first day of June, A. D. eighteen hundred and seventy-one,

with the consent of my people, when the country on both sides of the Spokane River belonged to me and my people, for a valuable consideration sell to Frederick Post the place now known as Post Falls, in Kootenai County, Idaho, to improve and use the same (water-power); said sale included all three of the river channels and islands, with enough land on the north and south shores for water-power and improvements; and have always protected the said Frederick Post, for eighteen years, in the rights there and then conveyed, and he has always done right with me and my people. We, the chiefs of the Coeur d'Alenes, have signed articles of agreement with the Government to sell the portion of the reservation joining Post Falls, in which we have excepted the above-prescribed rights, before conveyed to Frederick Post, and no Indian and no white man except Frederick Post have any rights on the above-described lands and river channels; the said Frederick Post has fulfilled all of his agreements with me and my people by improving the water-power and building mills at great expense, and I hereby authorize him to build a house and take full possession of the above-described lands on the reservation side, so that when the treaty is confirmed he may have full possession and protection of the Government in the same.

"Given under my hand and seal this 16th day of Sept'r., A. D. 1889.

his
"ANDREW x SELTICE.
mark.


Spokane River
1889 Cession
Coeur d'Alene Lake
Coeur d'Alene R.
St. Joe R.
Reservation Boundary-1873
WASHINGTON / IDAHO BORDER